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LIABILITY OF GOVERNOR, MAYOR OR OTHER EXECUTIVE OFFICIAL FOR NEGLIGENCE OF HIS APPOINTEES.

The terrible tragedy recently enacted in the Iroquois Theatre in Chicago, not in glittering sham or hollow imitation, but in dreadful reality and with such heart-rending results, has been dragged into political and judicial controversy.

In the madness of bitter regret over this unfortunate affair, the people of Chicago have allowed themselves to be led into the commission of acts which would be ridiculous if they were not so serious. The instance which we have in mind, at this writing, is the verdict of the coroner's jury accusing Carter H. Harrison, Mayor of Chicago, of responsibility for the disaster because of the negligence of two of his appointees, the fire chief and the building commissioner, and ordering that he be held to await the action of the grand jury or "until discharged by due process of law." On the strength of this verdict Mayor Harrison was arrested and at once gave bond, but on the advice of counsel he decided to nullify the bond and give himself into custody, in order to sue out a writ of *habeas corpus*. In the proceedings before Judge Tuthill, by whom the case was immediately heard, the corporation counsel, in a statement setting forth the mayor's position, declared the chief executive of the city might not legally be held for alleged failure of subordinates to perform their duties. The attorney insisted that final disposition of the mayor's case, in the regular routine of court proceedings, might be delayed from time to time, covering a protracted period; in the interim the situation would bring embarrassment to the city. It was to avoid the latter situation, the attorney declared, the writ was sued out. Judge Tuthill, in granting the writ, handed down an opinion, from which we extract the following pertinent statement:

"I find that there were gross violations, not only of the city ordinances, but of common rules of safety that anybody, without any expert knowledge, would have said were absolutely essential at the Iroquois. But how the mayor, who is simply at the head of the city government, could be held responsible for any misconduct on his part, in view of this evidence, I cannot conceive. It seems to me it would have been just as reasonable to say, that because an insane asylum was burned, the governor could be held over by a coroner's jury for being a party, a criminal party, to such loss of life, and held over criminally to a grand jury because, forsooth, an insane asylum under the charge of one of his appointees, the warden, had been burned."

As to the liability, civil or criminal, of the mayor of a city for the negligent or criminal act of his appointees the reports furnish no precedent whatever to show the existence of any such responsibility. Indeed all authorities which have touched upon points within the near radius of this question seem to deny that the relation of master and servant, necessary to impute such a liability, exists between a public official and his appointee. Thus, General Booth of the Salvation Army was held not responsible for the neglect of one of his appointees. London Omnibus Co. v. Booth, 63 L. J. Q. B. 244. So also it has been held that the relation of master and servant does not exist between a Catholic bishop and the priest of the parish whom he appoints. Stack v. O'Hara, 2 Pa. Co. Ct. 348. It would seem that on reason and principle, it could hardly be said that the relation of master and servant existed between the mayor of a city and his appointees. The mayor in making his appointments, does not act for himself but as agent for his master, the city, and the latter and not the former sustains the relation of master to all of its employees. The mayor stands more in the nature of a fellow servant to his own appointees, and parties injured by the negligence of either must look to the municipality as the master of both. The proposition attempted to be sustained by the coroner's jury is similar to the case of a merchant who appoints A to engage servants for him. Is A liable for the negligence, criminal or otherwise, of such servants? Is not rather the merchant, their common master?

But in this case it was said to be the duty of the mayor to see that his appointees did their work properly, or further than that that he himself was under obligation to see that all the ordinances of the city were

enforced. Here we have a more difficult question. We have, also, however, a very strong precedent—one which goes further than the proposition before us. In the case of Slater v. Wood, 22 N. Y. Sup. Ct. (9 Bosw.) 15, it appeared that the mayor of New York City, claiming, but without authority, to be at the head of the police of the city and having under his control a larger body of men organized for that purpose and known as the "municipal police," was informed that the metropolitan police, which was then the legal police force of the city, but whom the mayor directly antagonized, were about to eject the street commissioner of the city from his office without process of law. The mayor accordingly called together the municipal police, and while they were guarding the building, a coroner, having a proper legal warrant for the arrest of the mayor, came to the city hall to execute it, accompanied by a number of the metropolitan police, of which plaintiff was one. Their attempt to enter for the purpose of arresting the mayor was resisted by the municipal police, and in the fray the plaintiff was injured. The court held, through Bosworth, Chief Justice, who wrote the opinion, that if such assembly was not an unlawful one, the mayor was not liable in a civil action for wrongs done by the individual members of it; having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit which he was in no way privy. Another New York decision, however, by the supreme court of that state has held that the mayor of a city is liable for failure to enforce a city ordinance requiring property owners to keep snow and ice off the sidewalk. Piercy v. Averill, 37 Hun, 360. This ridiculous decision is condemned in sufficiently strong terms in the dissenting opinion, and therefore, needs no comment from us. It might probably, however, give some aid or comfort to the enemies of the mayor of Chicago, in the proceedings arising out of the unfortunate occurrence to which we have already alluded.

Nothing, however, which we have stated in this editorial is intended to reflect in any manner upon the liability of the city of Chicago itself in this affair. We may have occasion to discuss that question at another time.

NOTES OF IMPORTANT DECISIONS.

INFANTS—LIFE INSURANCE NOT A NECESSARY.—Is a contract for life insurance, a necessary? If we should accept the earnest, compelling appeals and entreaties of the insurance solicitor, we could certainly regard nothing so absolutely necessary as life insurance. But the courts are not apparently so enthusiastic as our friend, the insurance solicitor. In the recent case of Simpson v. Prudential Insurance Co., 68 N. E. Rep. 678, the Supreme Court of Massachusetts held that a contract of life insurance is not a necessary, or within the class of contracts which, as a matter of law, are beneficial to or binding on infants. The court said: "It is manifest we think, that, however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessaries, or within the class of contracts which have been held, as matter of law, to be beneficial to, and therefore binding upon, an infant. It is only when the contract comes within the class of contracts which, as matter of law, are binding upon an infant, that the question of its reasonableness and prudence is material."

The court also held in this case that a life insurance company, on avoidance by an infant of a policy taken out by him, is not entitled to retain out of the premium the cost to it of keeping the policy in force. Recent decisions in other jurisdictions do not militate against the views of the court in the principal case. Thus in the recent case of Union Central Life Insurance Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. Rep. 230, it was held that a policy of life insurance issued on the life of a minor, payable to him if living at maturity, and to his executors, administrators, or assigns in case of death before maturity, is not absolutely void, though the insured has power to elect to avoid it on arriving at majority. In the recent case of O'Rourke v. John Hancock Mutual Life Insurance Co., 50 Atl. Rep. 834, the Supreme Court of Rhode Island held generally that an infant was not bound by his warranties in an application for life insurance, and the insurer cannot defend an action on the policy by proving their falsity. In this case however, the defense of the company was offered, not against the infant, but against his beneficiary in an action to recover the amount of the policy. On this particular point the court held that, although ordinarily a plea of infancy is a privilege personal to the infant, a beneficiary in a policy on the life of an infant may plead infancy in answer to the company's defense of false warranties in the application; for otherwise an infant's contract of insurance would be in effect binding on him during his minority.

ARRESTS—RIGHT OF MUNICIPAL POLICE OFFICER TO PURSUE ESCAPING PRISONER BEYOND CORPORATE LIMITS.—So often in human experience we see corroborated the expression,—"turning the tables." But it is not often that a crimi-

nal caught red-handed in an act can resist arrest, give the officer a merry chase to the city limits and as he crosses the line s op short and dare the officer to touch him, which the officer assaying to do, is charged with assault and sued successfully for damages. This is the decision of the Supreme Court of North Carolina in the recent case of Sossamon v. Cruse, 45 S. E. Rep. 757. This case was an action for an assault. It appeared that defendant, a policeman, attempted to arrest plaintiff; that plaintiff overpowered defendant and his associate officer, and escaped with their "billies;" and that the officers pursued plaintiff beyond the corporate limits of the town. Plaintiff testified that as he ran they shot at him several times. Defendant testified that he fired at plaintiff beyond the town limits because plaintiff was advancing upon him in a threatening manner, while plaintiff testified that it was because he refused to surrender the "billies." The court held that an instruction that if defendant arrested plaintiff, and plaintiff, "not being out of the control of the defendant," attempted to escape, to prevent which defendant fired, such shooting would not constitute an assault, was erroneous, as the evidence showed that plaintiff was not, when shot at, under the officer's control. The court, in its opinion, said: "The power of policemen to make arrests, except when they are acting in obedience to the process of a court, under section 3810, is confined to the corporate limits of the town. We do not think, therefore, that the defendant had a right to pursue the plaintiff beyond the town limits in order to arrest him after he had escaped. When the prisoner had escaped from the custody of the officer, he certainly had no more power or authority to rearrest him than he had when the original arrest was made, and his power in the latter case could only be exercised within the town limits. If he had failed in his first attempt to arrest the plaintiff, and the latter had escaped beyond the town limits, the defendant could not have pursued him for the purpose of making the arrest; and it follows, therefore, that his pursuit of the prisoner beyond the limits after he had successfully resisted arrest and escaped was unlawful."

NEGLIGENCE—INSTINCT OF SELF-PRESERVATION.—The rule in accident cases that, in the absence of evidence, plaintiff will be presumed to have acted with due care is based on what is called the instinct of self-preservation. While many courts have resisted and expressed doubts as to the existence of a presumption based on any such instinct or natural impulse, the Supreme Court of the United States is apparently convinced in its own mind that there is only one side to the question and that is that there is no more universal instinct than that of self-preservation, and that a presumption may very reasonably rest on such a general experience of human kind? Justice McKenna in speaking for the court in the recent case of Baltimore & Potomac Railroad Company v. Landrigan, 24 Sup. Ct. Rep. 137, says:

"There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in Texas & P. R. Co. v. Gentry, 163 U. S. 353, 366, 41 L. Ed. 186, 192, 16 Sup. Ct. Rep. 1104. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation,—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to. But, notwithstanding the incentives to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence.

"This was the ruling in Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. Ed. 1014, 19 Sup. Ct. Rep. 763, the case which plaintiffs in error oppose to Texas & P. R. Co. v. Gentry. In the Freeman case a man thirty-five years old, with no defect of eyesight or hearing, familiar with a railroad crossing, and driving gentle horses, which were accustomed to the cars, approached the crossing at a trot not faster than a brisk walk, with his head down, looking at his horses, and drove upon the track, looking 'straight before him, without turning his head either way.' This was testified to by witness. There was direct evidence, therefore, of inattention. There is no such evidence in this case, and the instructions given must be judged accordingly. The court did not tell the jury that all those who cross railroad tracks stop, look, and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence. The instruction was a recognition of 'the common experience of men,' from which it was judged in the Freeman case that the deceased in that case had not looked or listened, and submitted to the jury that which it was their constitutional duty to decide. And there was enough evidence to justify dispute, and from which different conclusions could be drawn."

EFFECT UPON A FORECLOSURE SALE OF THE DEATH OF THE MORTGAGOR BEFORE CONFIRMATION.

The result of a foreclosure, though technically different in different jurisdictions, is always substantially the same. At the end of the process the beneficial ownership of the property is found to vest in a new owner, the

purchaser at the sale, or his assignee or grantee, who has secured slowly, as if by accretion, the rights of the former owner. It frequently happens, however, that while this process of foreclosure is going on, the interest of the former owner passes by operation of law on the death of that owner to his heirs. It then becomes an important question to determine how far a proceeding carried on against A, ancestor, as defendant, binds the heir of A, who is not a party to the suit. This question was raised in a recent case and a discussion of the point there raised may prove of some general interest.[1]

A, owner of a piece of real estate subject to a mortgage, which he himself had executed, was made a party to a foreclosure bill, under which such proceedings were had that the property was, under decree of court, advertised for sale at 11 o'clock in the morning of July 6, 1899. A died at 3:30 in the morning of said day, leaving certain children, his heirs and a widow. Some time thereafter the widow and certain major children filed their petition in the same court, setting up the above facts and praying that the sale and order of confirmation thereof might be set aside. No attempt had been made to make the said heirs parties to the suit or to affect their interests other than under the name of their father. During the early stages of the litigation, the question was treated by both parties as being one of application of a certain special statute. In the appellate court, however, the purchaser of the property at the foreclosure sale for the first time raised the point that the statute[2] is in terms applicable only in case of "decrees for the payment of money," that a foreclosure decree is not within the description and the statute therefore does not apply. This is undoubtedly true; but it follows that the common law rule applies in the absence of statute, which strips the question of all statutory complications, and leaves, asserted and denied, this bare legal thesis—the death of A while the foreclosure was in process but before confirmation and sale, abated the proceeding, which could become valid against heirs only by making them parties to the proceeding by bill of revivor, *scire facias*, or other method.

It is evident on the one hand that if the death took place before any foreclosure proceedings were begun, the foreclosure would be invalid, unless the heirs were made parties. It is as evident that if the whole proceeding is completed and the deed delivered and recorded thereunder before the death, the heirs would have no rights to enforce and no attention need be paid to them. The proceeding, therefore, of whatever sort, must in time reach a point beyond which it could not be interfered with by the death of a mortgagor. We have therefore to determine what this point is in the case of a mortgage foreclosure.

In the first place, it is to be noted that cases of death during the process of sale under execution supply no analogy. The distinction is clearly set forth by Freeman as follows: "If a sale is ordered by the court, is conducted by an officer appointed by, or subject to the control of the court, and requires the approval of the court before it can be treated as final, then it is clearly a judicial sale. Such a sale is unquestionably a sale by the court. * * * Execution sales are not judicial. * * * The chief differences between execution and judicial sales are these: the former are conducted by an officer of the law in pursuance of the directions of a statute; the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sale is usually complete when the property is struck off to the highest bidder; in the latter it must be reported to and approved by the court."[3]

The same point is made by a Maryland case as follows: "But it may be said, if the court be the vendor in sales made by its trustee, would it not follow, for the same reasons, that a court of common law must be considered as the vendor in sales made under its writ of *fieri facias* by the sheriff? The cases

[1] The case referred to is reported in the Illinois Supreme Court Reports, 190 Ill. 17, and Illinois Appellate Court Reports, 104 Ill. App. 156. In the supreme court, however, no question was considered except one of jurisdiction arising under the Illinois Practice Act. In the appellate court the only question decided was that of the applicability of a certain Illinois statute, the fact that the issue raised by the briefs was that of the common law rule, in the absence of statute, having been wholly overlooked by the court.

[2] Starr & Curtis Ill. Stat. ch. 77, sec. 39, p. 2371.

[3] Freeman on Void Judicial Sales, sec. 1, p. 2; 17 Am. & Eng. Ency. of Law (2d Ed.), 953; 9 Ency. of Pl. & Pr. 954, 501; Jones on Mortgages, vol. 2, sec. 1637.

are essentially different. * * * At common law, the terms and manner of sale are regulated by law; in chancery, they are regulated by the court. At common law, if the sheriff, in seizing the property and making the sale, conforms to the established regulation applicable to all cases (and he can sell in no other manner), the sale is final and valid as soon as it is made. But in chancery, the sale is in no case binding and conclusive until it has been expressly approved and ratified by the court. If it be made in all respects conformable to directions, it may still be rejected. And hence, it is obvious that in one case it is the court of chancery who is the real vendor and in the other the sheriff, or executive officer of the court."[4]

As to the second class of cases, to-wit, judicial sales proper, the work of the court was not complete and could not be so until after the confirmation of the sale. In the meantime, the defendant died, and the instant this happened, by operation of law, the rights, the property, the estate in controversy, passed to other parties who were not before the court and over whom the court had no jurisdiction. The interest which was being foreclosed was the defendant's equity of redemption and this is an estate.[5] This estate is the creation of courts of equity, is, in the absence of statute, recognized only in courts of equity, and it is not divested until the judicial process is complete, which is not until after the sale.[6] A judicial sale of this estate, therefore, is one made *pendente lite*,[7] and the sale is not complete until confirmed.[8]

Since the attempt here is not to divest the estate of the defendant by force of ministerial, but by judicial, sale and act, the moment that one defendant died, the court lost jurisdiction by the death and it became necessary to revive the decree by bringing in the new parties in interest. Thus, Story speaks as follows: "An abatement in the sense of the common law is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law a suit, when abated, is absolutely dead. But in equity a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived. The death or marriage of one of the original parties to the suit is the most common, if not the sole, cause, of the abatement of a suit in equity. * * * Upon the death of a defendant * * * all proceedings became abated as to that defendant."[9]

From all these authorities it appears that the proceeding in the present case is one which it is necessary to revive in some manner in absence of statute. The essential point is that the court proceeds, if it attempts to act in such a case, without having one of the necessary parties before the court; not the original party, because of his death; not his heirs, the present owners of the equity of redemption, because they have not been brought before it in any fashion. It has been so affirmatively held in the case of Glen v. Clapp,[10] a typical case which sets forth reasons under general equitable principles for holding a revivor in some form necessary. In that case both complainants died before sale, and, when the question of confirmation thereof came before the court, it also appeared that one of the defendants, a second mortgagee, was also dead, and his representative appeared and became a party. On exceptions filed to the sale on behalf of the principal defendant, the lower court refused to set aside the sale, which was made under decree of foreclosure. Upon appeal the court said: "* * * It is admitted, in argument, that the proceedings should have been revived before the sale, but it is alleged that the abatement was only technical, inasmuch as the claim of Morris & Egerton had been

[4] Andrew v. Scotten, 2 Bland. (Md.) 629. For illustration of the application of the rule, in many phases in the case of executions, see the following: Clingman v. Hopkie, 78 Ill. 152; Davis v. Moore, 103 Ill. 445, 447, 448, 449; Brown v. Parker, 15 Ill. 307, 308; Pickett v. Hartsock, 15 Ill. 279; Littler v. People, 43 Ill. 188, 194; Scammon v. Swartwont, 35 Ill. 326; Wilson v. Lowmaster, 181 Ill. 170, 172.

[5] Bispham's Prin. of Eq. sec. 151; Jones on Mortgages, sec. 6; Lightcap v. Bradley, 186 Ill. 510, 519, 524.

[6] Bispham's Prin. of Eq. sec. 156.

[7] 17 Am. & Eng. Ency. of Law (2d Ed.), 953; 9 Ency. of Pl. & Pr. 501.

[8] Freeman on Void Judicial Sales, sec. 1; Hart v. Burch, 130 Ill. 426, 433; Davies v. Gibbs, 174 Ill. 272, 276, 277; Jennings v. Dunfey, 174 Ill. 86.

[9] Story on Eq. Pl. sec. 354; 5 Ency. Pl. & Pr. 790, 834; Mitf. & Tyler's Pl. & Pr. in Eq. 155; Story's Eq. Pl. sec. 366.

[10] 11 Gill & John. (Md.) 1.

discharged, and that the subsequent proceedings ought not to be set aside now for this cause. * * * To whatever extent this may be the case, so far as regards the respective interests of the parties now before the court, we cannot admit that the rights of Morris & Egerton's representatives are concluded by allegations made in the cause after they had ceased to be parties to it. It is precisely upon the ground that great injustice will result by permitting the rights of absent and ignorant claimants to be finally decided by the evidence of other and often interested persons, that the rules have been adopted regulating the abatement of causes, and requiring proper parties to be brought before the court. The first principles of justice demand that, before the court shall finally and conclusively adjudicate upon the rights of the representatives of a deceased party, an opportunity shall be afforded them to vindicate those rights, quite as much as they demand that all other persons shall have the opportunity to defend their property before its title is decided upon by the court. The necessity then of affording to the legal representative of Morris & Egerton an opportunity to contest this question of payment, illustrates the propriety of bringing them into court. * * * We think the abatement of the suit before the sale, where that circumstance is relied on as an exception, and made before final ratification, is a sufficient reason for setting aside the sale. But, it is to be considered, that the true character of such a sale is that it is a transaction between the court and the purchaser; that a private sale may be made, as well as a public sale, if the court deem it advantageous, and that after setting aside the sale as formally irregular, the court might revive the terms of the contract with the same purchaser, if no other objections existed, and those terms were deemed advantageous to the parties who are thus in court, prepared to protect their interests in this, as in every other respect."

It follows from the foregoing that since the rule applicable is that of the common law where no statute provides a different one, a foreclosure proceeding becomes void whenever a defendant, or at any rate a defendant owning any interest in the property sought to be foreclosed, dies during the progress of the foreclosure proceedings.

This further question remains for discussion. Within what time must the death occur in order to have this effect of making it necessary to bring in the heirs? This, however, is easily determined in the light of the maxim, *Ratione cessante lex ipsa cessat.* Now the reason for bringing in the new parties is that they have acquired *pendente lite* an estate in the property. In short, they are entitled to be made parties so long as the death results in giving them an estate. This is true so long as the original party to the suit has any interest in the property which depends on the action of the court, so long as the court retains any right to affect the proceeding. This brings us to the ultimate legal question,—at what point does the court cease to have any right to interfere? The reasoning of the authorities above cited leads to the conclusion that when the order of confirmation of the sale has been entered, certainly if the court has lost jurisdiction to set aside that order of confirmation, the defendant ceases to have such an interest that his death makes necessary the bringing in of his heirs as parties. True, he has still a right of redemption. But so he has in case of a sale on execution—in both cases the matter has become a mere matter of time and ministerial act.

The rule has so far been stated simply as matter of authority and a technical rule. As matter of fact, however, it is founded upon good and substantial reasons of abstract justice. And if we ask upon what difference in facts the distinction is founded, the experience of mankind answers the question. The decease of the owner of the property is apt to be preceded by a long period of illness which prevents attention to property affairs. Furthermore, at the instant of death, heirship vests in new people unacquainted with the situation of the property, and in many cases some of these heirs are minors, so that the making of title either for purpose of sale or for purpose of giving security whereby money may be raised by way of loan, is either made difficult or absolutely prevented. Clearly, under such circumstances, the new owners of the land are less in position to save the equity in the land by redemption than would the former owner have been.

In fact this rule is but one in a chain of equitable rulings which is exhaustively discussed in chapter 7 of Bispham's Principles of Equity

(4th Ed.) sec. 158, being pages 192–206. These pages trace the rulings of the courts from the first interference with the courts of equity with the original absolute forfeiture of the rights of the mortgagor on condition broken.

Swinging first to the one side in the attempt to be fair to the creditor, then to the other in the desire to be humane to the debtor, the courts have built up a complicated system of rules for foreclosure proceedings. The requirement insisted on is no more a sheer technicality than any other. On the contrary, it is based on the same necessity, in order to give the unfortunate debtor a chance to secure what he may from the wreck that has dictated the whole equitable procedure. The technical rule and the equity and fairness of the case concur in requiring that a sale made after the death of the owner, though but a few hours later, should be set aside and a new one made after the persons who actually own the equity of redemption have been made parties to the proceeding.

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INSOLVENT DEBTOR—PROPERTY IN HANDS OF RECEIVER—SECURED CREDITOR—DIVIDENDS.

STATE NATIONAL BANK v. ESTERLY.

Supreme Court of Ohio, October 13, 1903.

Where the property of an insolvent debtor, by order of court, is placed in the hands of a receiver to be administered upon for the payment of the insolvent's debts, a creditor who holds collaterals taken to secure his claim, and upon which he has realized before a dividend is declared, is entitled to a dividend on only so much of his debt as remains after deducting the proceeds of the collaterals; and this sum may be ascertained at the time the dividend is declared, although the claim had formerly been proven and allowed for the full amount.

The plaintiff in error commenced an action in the court of common pleas of Columbiana county against the defendant in error, who was and is receiver of the insolvent firm of J. Esterly & Co., to compel the allowance of dividends on certain notes owned by plaintiff in error upon which said insolvent firm were liable as indorsers. One of said notes is dated August 1, 1896, and calls for the payment of $5,500 four months after date, with 8 per cent. interest per annum after maturity, and signed by "Columbiana Pump & M'ch Co." The other note is dated October 24, 1896, and calls for $3,132.70, payable four months after date, with 8 per cent. interest after due until paid. This note is signed by "The Ohio Lumber & Mining Co." It was stipulated in each note that, if the interest was not paid when due, the same should be added to the principal, and the aggregate should draw interest at same rate until paid. When J. Esterly & Co. indorsed and transferred said notes to the bank, it also transferred collaterals to secure their indorsements, from which collaterals the bank realized such amounts that, if applied, materially reduce the claims against indorsers. Inasmuch as the answer of the receiver admits all the facts alleged in the petition except their legal effect, the petition is here copied omitting the caption:

'For its cause of action against the defendant plaintiff says that on May 11, 1898, being the owner of claim against J. Esterly & Co., based on a promissory note, of which a copy, with all indorsements thereon, is hereto attached, marked 'Exhibit A,' and made a part hereof, it presented the claim on said day, May 11, 1898, to said Aaron Esterly, as such receiver, for allowance against the said estate of which he was receiver, and thereupon on said date the claim was allowed by indorsement thereon as follows: 'May 11, 1898. Allowed subject to distribution. Aaron Esterly, as Surviving Receiver of J. Esterly & Co., Bankers.' That said J. Esterly & Co. were and still are liable on said notes as indorsers thereon. Said note bears date August 1, 1896, is due in four months from date, and draws interest after maturity at eight per cent. That at the time of the presentation of said claim for allowance there was due thereon to the plaintiff from J. Esterly & Co. and said receiver the sum of $1,187.48. That afterwards, as appears by indorsement on said note, and on April 22, 1901, there was paid thereon the sum of $834.73, being realized from makers of note and assignee of makers of same. After deducting such payments and computing interest according to law, there was due on said note June 1, 1901, the sum of ten hundred eighty-nine dollars and thirty cents ($1,089.30), which amount still remains due from the estate of J. Esterly to the plaintiff, and remains wholly unpaid. That afterwards, and on or about May 30, 1901, the said Aaron Esterly, receiver, informed the plaintiff that a dividend of about thirty (30) per cent. was to be made by him as receiver to the various creditors; that he proposed to compute such dividend upon the balance at present owing, exclusive of interest, instead of computing upon the amount allowed as aforesaid. To this method of computation plaintiff objected, and thereupon said Aaron Esterly, through his attorney, W. G. Wells, notified the plaintiff that the claim was wholly disallowed and rejected, and that the plaintiff would be obliged to bring suit and have the question settled in court. The plaintiff says that no amount has been paid on said claim by the receiver, but all amounts paid thereon have been realized from the collaterals held by the plaintiff for the payment of said note. The plaintiff further says that the dividend should be computed on the amount owing at the time of the insolvency of said bank

and the appointment of the receiver therein, viz., December 8, 1896, and that at that time the entire principal was due on said note. If interest is added to other claims in the computation, then interest should be added to the claim of the plaintiff before computing the dividend. The plaintiff further says that the said receiver had no right to disallow the plaintiff's claim because of the dispute in the mode of computing the dividend, and his action therein was and is illegal and void."

The pleadings presenting purely questions of law, the court of common pleas found against the plaintiff bank as to the basis upon which dividends should be computed. It appealed from the judgment and order of that court to the circuit court, where the cause was heard and submitted on the pleadings. The circuit court made the following findings and order: "This cause coming on for hearing on this day was submitted to the court on the pleadings, and the court, being fully advised of the issue raised by said pleadings, and the questions of law involved, do, upon the allegations made in the answer, find that all the payments made upon the two notes described in the petition subsequent to the presentation and allowance of said claims by the receiver, and subsequent to the date of the insolvency of said J. Esterly & Co. and the appointment of the receiver therein, to-wit, December 8, 1896, should be credited upon said notes, and that the balance due after crediting said payments is the basis upon which the plaintiff should receive dividends pro rata with the other general creditors of said insolvent bank; that the balance due upon said notes should be allowed as a valid claim against the estate of J. Esterly & Co., and that said balance is the sum of $1,596.09, and should be allowed as of the date of May 11, 1898. Wherefore the court finds that the balance due on said notes on May 11, 1898, to be the sum of $1,596.09; that the same is a valid claim against Aaron Esterly, receiver of J. Esterly & Co.; and it is hereby ordered, adjudged, and decreed that said claim be and is hereby allowed, that the defendant be ordered to allow said claim, and that said sum of $1,596.09 be the basis upon which dividends shall be paid plaintiff in common with other general creditors, and that said allowance be made as of the date of May 11, 1898."

The court ordered the costs paid out of the funds in his hands as receiver. The plaintiff in error filed a motion for new trial, which was overruled, and error is prosecuted here to reverse the findings and order as to the basis for computing the dividends.

PRICE, J.: (after stating the facts) We learn from the averments of the petition filed in the lower court by plaintiff in error that at some date prior to the appointment of a receiver for the firm of J. Esterly & Co. it had become liable to the plaintiff bank as indorsers upon two promissory notes mentioned in the foregoing statement of this case, and that the liability of the firm had become fixed when the notes were properly presented to the makers thereof and protested for nonpayment. It also appears that, to secure the bank in accepting the notes bearing such indorsements, J. Esterly & Co., at the time of their transfer, delivered to it certain valuable collaterals as security for their contracts of indorsement, and from which collaterals after the receiver was appointed, the bank realized from time to time in substantial sums, which, if applied as credits on the obligations of indosement when collected, would materially reduce the obligations before the receiver was ready to pay a dividend. The receiver was appointed on the 8th day of December, 1896, about the time the larger of the two notes became due. On or about the 11th day of May, 1898, the bank presented its claims to receiver for allowance, and they were allowed "subject to distribution." The amounts which the bank realized on the collaterals were collected at different times after the appointment of the receiver. On or about the 30th of May, 1901, the receiver notified the bank that he was ready to make a dividend to the various creditors, and that he would compute such dividend upon the balance then owing, exclusive of interest, and not upon the full amount of the indorsements of the insolvent firm. On refusal to accept a dividend on the proposed basis, the bank brought its action in the court below to have its rights determined. It failed in its contention in the lower courts, and its counsel thus formulates the inquiry in this court: "Shall dividends be computed (1) upon the amount due at the date of the appointment of receiver, or (2) upon the amount due at the time the claim is presented and allowed, or (3) upon the balance unpaid at the time of settlement?"

This case has been considered with two others involving similar questions, which cases will be stated at the close of this opinion. Learned counsel representing the parties in each case have been heard orally, and they have submitted briefs containing careful discussions of the points involved, wherein are cited a long array of cases adjudicated in the English and American courts, the latter embracing both state and federal. Numerous text-writers have been drawn upon by each side of the controversy, until we are constrained to agree with counsel that the authorities are about equally divided, both as to numbers and their apparent weight. Their reconciliation is impossible, and a careful review of them here would be fruitless labor. Counsel for plaintiff in error in this case, and to some extent counsel in the other cases herewith decided argue their causes as if the dispute arose in the settlement of an estate under a deed of assignment for the benefit of creditors, and lay down the proposition to govern this case that: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportion or part of the whole as the debt due him was of the aggregate of the

debts. The extent of this interest was fixed by the deed of trust. * * *" This proposition is found in many of the authorities cited in behalf of the bank, and, indeed, it seems to be the favorite reason for the holdings made. Notably this is true in Miller's Appeal, 35 Pa. 481, Merrill v. Bank, 173 U. S. 131, 19 Sup. Ct. Rep. 360, 43 L. Ed. 640, and Bank v. Armstrong, 59 Fed. R p. 372, 8 C. C. A. 155, 28 L. R. A. 231, cited for plaintiff in error. If, for any reason, we are required to consider this and its kindred cases under the law governing the mode of administering estates under our assignment laws—which we do not concede—we are of opinion the proposition is entirely too broad, and is subject to important limitations. In cases of assignment under our insolvent laws the legal title of the property of the assignor passes to the assignee, in trust for the benefit of not some, but all, creditors of the assignor. The unsecured creditor is as fully represented by that title as is he who holds collateral security for his claims, and, if he becomes the equitable owner of such "a proportional part of the whole as the debt due him is of the aggregate of the debts," his equitable title is not weakened nor his equitable joint share decreased by the fact that another creditor has security for all or part of his claim. But to allow a dividend to the secured creditor on the basis of his entire claim unreduced by collected collaterals would diminish the share of the general or unsecured creditor in the estate of the insolvent debtor. In other words, to pay a dividend on more than is actually due on a secured claim will unjustly reduce the general fund in which the unsecured creditor is entitled to share.

But we do not think the interest or title of creditors in the assigned property is the determining factor, if even they have an equitable ownership. The deed of assignment, under our statute, must be general, and inure to the benefit of all creditors, and their rights are to be worked out through the assignee as they appear from time to time during the administration of the trust. In such case the creditors are not purchasers of the estate in proportion to their claims, for investigation and proper defense against the claims of one or more may modify or extinguish their interest in the estate, so that whatever title, equitable or otherwise, a creditor may have in the assigned property, it is at best but contingent, and subject to adjudication with other demands held against the debtor. As said by Owen, C. J., in Mannix, Assignee, v. Purcell, 46 Ohio St. 135, 19 N. E. Rep. 584, 2 L. R. A. 753, 15 Am. St. Rep. 562: "No higher or better right or title to any of this property passed to the assignee than the assignor held. His creditors acquired no new rights or remedies in or against it by force of the assignment. The assignee simply represents them and their rights, which he has undertaken to enforce by the plain processes appointed by statute. They do not, in any sense, stand to the assigned property in the relation of purchasers. The beneficiaries of the property which the assignee is now seeking to subject to the payment of the assignor's debts are free to assert against the latter every right and claim which, before the assignment, they could have asserted against the assignor." The equitable ownership of a creditor in the assigned property, if any there be, is contingent merely, because its force and validity depend upon the subsequent events. Such creditor must present his claim to the assignee for allowance within a certain time. If rejected, he must sue within a specified time. Default in either loses his right to share in the estate, unless saved by other provisions of our law. If he presents his claim before it is allowed, or any payments made thereon, "he must make and file an affidavit setting forth that the said claim is just and lawful, and the consideration thereof, and what, if any, set-offs or counterclaims exist thereto; what collateral or personal security, if any, the claimant holds for the same, or that he has no security whatever; and the assignee or trustee or any creditor shall have the right to examine the claimant under oath touching any such collateral or other security, or any other matter relating to said claim, within such time and under such regulations as shall be prescribed by the probate judge." See section 6354, Rev. St. 1892. The making and filing of this affidavit is not optional with the creditor, but it is essential to the proper allowance of his claim, and it proceeds upon the evident policy of the law that the affidavit will truthfully disclose both the nature of the claim and its condition with reference not only to payments made, but as to what admitted set-offs or counterclaims exist whereby the creditor's demand may be in part or wholly satisfied. This procedure is against the theory that by assignment a creditor acquires a definite equitable ownership in the assigned property that shall measure his rights to dividends in the further administration of the estate. It further argues that its purpose is to give the assignee, and the probate court on the report of the assignee, full knowledge of the condition of each claim, in order that rights of the general as wel as the secured creditors may be determined. If valid off-sets then exist, if good collaterals are held from which collections are being made, they are to be so applied that the general creditors may receive their equitable portion of the estate. And we think that this information as to the condition of the claims is to be furnished so that a dividend may be made on equitable principles, because whatever amount a secured creditor receives beyond what is actually due him after application of money realized from collaterals, or after allowance of admitted off-sets, must be taken from the general fund, and therefore from the general creditor. Therefore it seems to us that we should hold and answer the third inquiry of counsel by saying that the dividend should be computed "upon the balance unpaid at the time of the settlement." The result to be thus reached

is the result that would be reached in an action at law between the creditor and the debtor, because the latter could have the court or jury fix the true amount he owes the creditor after deducting valid set-offs and counterclaims, and the balance would be the real debt. We do not now see why the standing in the probate court in an assignment case should be better than in the action at law, because the rights of the creditors in reference to such claims as are here involved can be fully worked out in administration of the assigned estate. When the estate is ready to warrant a dividend, and it is known from the proof of claim that set-offs or collaterals existed when the claim was allowed, the amount of the admitted set-off, or what has been paid from the collaterals, should be deducted, and the balance due is the true basis for a dividend.

We have devoted time to this extent in discussing the rule in assignment cases because its discussion pervades so largely the briefs of counsel, wherein they liken the cases at bar to assignment cases. But the analogy is not complete. In the cases under review receivers were appointed, and it is not open to debate that title to the debtor's property does not vest in the receiver, but remains in the debtor, subject to the possession and control of such receiver, until he sells the same under the direction of the court, when the title passes to the purchaser. Creditors who had no lien or title prior to the appointment of the receiver gained neither in any sense nor degree through the receivership. Hence it is that property in the hands of a receiver is considered as in the court, and under its control, to be administered so as best to subserve the ends of equity; and when the debtor's estate becomes assets in his hands the general creditors acquire rights which the court will protect by placing all the creditors on an equality as far as possible. This is the rule stated in Bank v. Bank, 33 N. J. Eq. 266, and many other cases. Therefore the argument of an equitable ownership by the creditor in assigned property can have no application whatever here. But, if we are right in our views as to the rights of creditors in assigned property, it seems quite clear that the same rule should be enforced in settlements of estates placed in the hands of a receiver. All sums realized on the collaterals in this case were collected after the appointment of the receiver. Part was collected by the bank before, and the remainder after, the proving and allowance of its claims; but whether before or after allowance we think is immaterial. When the debtor's property has been reduced to money, and under the direction of the court the receiver is ready to make a dividend, there is nothing inequitable in crediting these amounts as payments *pro tanto*. The law would compel such an application if it was resisted, because the amount due the creditor is his claim less what has been paid or its liquidation, either directly or indirectly. When this is done, and not until then, do the secured and unsecured creditors stand on an equal footing. When that is done the secured creditor has received the benefit of his security, and is ready to claim a share in the general estate with the general creditors; otherwise, as before stated, the secured creditor would hold the avails of his security actually reducing his demand, and would also take from the general estate a portion which belongs to the unsecured creditors. This latter would be inequitable, while the former rule would do even and exact justice between all parties. To elaborate this doctrine, or quote from cases in which it is found, is not necessary. We think the principle is right, and approve it as has been done in a long line of cases, and by the best of modern text-writers. We therefore hold the circuit court did not err in its judgment, and the same is affirmed.

Judgment affirmed.

Burket, C. J., and Spear and Davis, JJ., concur. Shauck, J., dissents.

NOTE. — *On What Account and at What Time Computation Should be Made in Declaring Dividends in Insolvent Estates.* — The decision of the court in the principal case commends itself as being just and right and sets at rest a much mooted question, at least, for the state of Ohio. The question is well put, "Shall dividends be computed (1) upon the amount due at the date of the appointment of the receiver, or, (2) upon the amount due at the time the claim is presented and allowed, or, (3) upon the balance unpaid at the time of settlement?" The judge, in rendering the opinion, well says: "Numerous text-writers have been drawn upon by each side of the controversy, until we are constrained to agree with counsel that the authorities are equally divided, both as to numbers and their apparent weight. Their reconciliation is impossible. It will be observed also that the court has given as one reason for its conclusion the peculiar wording of the Ohio statute, which requires the creditor in presenting his claim to set up the fact whether he holds any collateral security, etc. The question was of so much uncertainty that before it reached the supreme court the circuit courts arrived at opposite conclusions. In Ohio the decision of Barrett v. Reed, Wright, 700, Searle v Brumback, 4 Western Law Monthly, 330, Spence, Assignor, 4 N. P. 439, and Bank v. Esterly, the principal case in the court below, were in accord with the final decision of the supreme court. The cases of Jelke v. Stallo, 1 N. P. 29, Cromwell v. Herron, 11 C. C. 448, Lloyd v. Bank, 30 Bull. 165, and Buckingham v. Springfield B. and L. to the *contra*. The United States Supreme Court, in the case of Merrill v. National Bank, 173 U. S. 132, in an opinion rendered by Chief Justice Fuller, concurred in by Justices Brewer, Brown, Shiras, and Peckham, decided contrary to the Ohio Supreme Court. In this United States Supreme Court case, however, Justices White, McKenna, Harlan, and Gray dissented, Justices White and Gray writing dissenting opinions. Chief Justice Fuller, does not go into the matter as exhaustively as Justice White, and a reading of both opinions rather convinces one that the opinion of Justice White is the stronger. But until reversed, the law of the Supreme Court of the United States is that "A secured creditor is entitled to dividends upon the face of his claim as it stood at

the time of the declaration of the insolvency, without crediting either his collateral or collections made therefrom after such declaration, subject always to the proviso that dividends must cease whenever from then and from collateral realized, the claim has been paid in full."

Decisions on this interesting question will be found as follows in the various states, sustaining the Ohio decision. Massachusetts: Armory v. Francis, 16 Mass. 308; Savings Bank v. Woodward, 137 Mass. 412; Middlesex Bank v. Minot, 4 Metc. 325; Lancton v. Wollcot, 47 Mass. 305; Loan and Fund Assn. v. Cronin, 86 Mass. 141. Maryland: Bank v. Langham, 66 Md. 462; Bank v. Bank, 80 Md. 371, 30 Atl. Rep. 913. Washington: *In re* French, 5 Wash. 344, 31 Pac. Rep. 755; Neufelder v. Ins. Co., 39 Pac. Rep. 110. Alabama: Warehouse v. Pipe Works, 106 Ala. 357, 18 So. Rep. 43; Gusdorf v. Ikelheimer, 75 Ala. 153. Iowa: Wurtz v. Hart, 13 Ia. 515. New Jersey: State Bank v. Receiver, 31 N. J. Eq. 266, 271; Whitaker v. Bank, 52 N. J. Eq. 400. Kansas: Am. Natl. Bank v. Branch, 57 Kan. 27, 45 Pac. Rep. 88; Surety Investment Co. v. Bank, 58 Kan. 414, 49 Pac. Rep. 521. Missouri: *In re* Estate of McCune, 76 Mo. 209. Nebraska: State v. Neb. Savings Bank, 40 Neb. 342, 58 N. W. Rep. 976. Louisiana: Bank v. Margy, 11 Rob. 209. Arkansas: Jamison v. Adler-Goldman Commission Co., 59 Ark. 548, 28 S. W. Rep. 35; Haskill v. Sevier, 25 Ark. 152. Colorado: Earl v. Lane, 22 Colo. 273, 44 Pac. Rep. 592. South Carolina: Wheat v. Dingle, 32 S. Car. 473, 11 S. E. Rep. 394. North Carolina: Creasy v. Pearces, 69 N. Car. 67; Moore v. Dunn, 92 N. Car. 63. Indiana: La Plant v. Convery, 98 Ind. 499; High v. Taylor, 97 Ind. 392. Tennessee: Field v. Creditors, 33 Tenn. 350, 355; Winton v. Eldridge, 40 Tenn. 361; Gwyne v. Ester, 82 Tenn. 662, 667. The following cases seem to be in accord with the United States Supreme Court. New Hampshire: Moses v. Roulett, 2 N. H. 448; Drew v. Drew, 60 N. H. 480. Michigan: Third Nat. Bank v. Haug, 82 Mich. 607, 47 N. W. Rep. 33; Bank v. Bayless, 67 Mich. 269, 37 N. W. Rep. 702. Oregon: Keller v. Miller, 22 Oreg. 406, 30 Pac. Rep. 229. Vermont: West v. Bank, 19 Vt. 404; Walker v. Carlos, 27 Vt. 709 (settled now by the state to the contrary); International Trust Co. v. Assignee, 63 Vt. 326, 22 Atl. Rep. 275, 18 Atl. Rep. 1043. Wisconsin: *In re* Myer, 78 Wis. 615, 48 N. W. Rep. 55. Illinois: Furness v. Bank, 147 Ill. 570; Levy v. Chicago Nat. Bank, 158 Ill. 88. New York: People v. Remington, 121 N. Y. 328; Hauselt v. Patterson, 124 N. Y. 349, 359. In the following states the rule has been changed by statute in accord with the Ohio doctrine. Connecticut: *In re* Wadell & Entz Co., 67 Conn. 324, 35 Atl. Rep. 357; *In re* Greely, 70 Conn. 494, 40 Atl. Rep. 233. Kentucky: Spratt v. Nat. Bank, 84 Ky. 85; Bank v. Laughbridge, 91 Ky. 472, 18 S. W. Rep. 1; Masonic Savings Bk. v. Bangs, 84 Ky. 135, 144. Minnesota: *In re* Skoll, 64 Minn. 250, 66 N. W. Rep. 986. Maine: *In re* Frickett, 71 Me. 266. California: *In re* Harvey, 32 Pac. Rep. 567. General Text Books: 1 Story's Eq. § 633; 5 Thompson on Corporations, § 7045; Overton on Liens, § 101; Bispham Eq. 5th Ed. § 343; Jones on Pledges, 2d Ed. § 587, 588; 2 Woerner on Admin. 859. English Cases: Grenwood v. Taylor, 1 Russ. & Milne, 185; Brockelhurst v. Jessop, 7 Simon, 438; Revised Reports, Vol. 40, p. 172; Mason v. Bragg, 2 My. and Cr. 443; Revised Reports, Vol. 45 p. 111; Morrice. v. Bk of Eng. Cases Temp. Talb. 218; Kellocks Case, Vol. 3 Chancery App. 31; Shepard v. Kent, 2 Vern. 435; Deg v. Deg, 2 P. W. 412, 416; Chapman v. Esgar, 1 Sm. & G. 575; Bain v. Saddler, L. R. 12 Eq. 570; Purdy v. Doyle, 1 Paige, 558. On the whole I think that we may agree that the decision of the principal case is right, and, as Judge Woerner says: "This view is gaining ground in the United States as being consonant with the principles of justice and putting the special creditors and the general creditors on an equal footing." See 49 Cent. L. J. 101

WM. M. ROCKEL.

JETSAM AND FLOTSAM.

IS THE INITIATIVE AND REFERENDUM CONTRARY TO THE PROVISIONS OF THE FEDERAL CONSTITUTION GUARANTYING TO EVERY STATE A REPUBLICAN FORM OF GOVERNMENT?

We have in a recent editorial called attention to the recent case of Kadderly v. City of Portland, in which the Supreme Court of Oregon held that the initiative and referendum was not contrary to the provisions of the federal constitution guarantying to every state a republican form of government. As this question is still an important one and cannot be considered definitely settled until the United States Supreme Court has passed upon it, we produce here the very excellent brief of Hon. William P. Lord, ex-justice of the Oregon Supreme Court, who filed a brief as *amicus curiæ*, contesting the validity of the initiative and referendum amendment as violative of the guaranty of a "republican form of government contained in the federal constitution." Judge Lord says:

"When the federal government was organized, a written constitution was adopted. All the states, those forming the Union, and those admitted since, have written constitutions. By these instruments, to better protect the rights of the individuals and the people collectively, the governmental functions were delegated to three departments, the executive, the legislative and judicial. The functions of each were defined in general and comprehensive, though clear and explicit terms, and were designed to operate as a check on each other, for the purpose of confining the duties of each to its own appropriate sphere, and preserving the independence and effectiveness of each department. In all these constitutions, the legislative power was delegated to the legislative body—in the federal government to congress, and in the states to the legislative assembly. In adopting these constitutions, the principle was recognized that all power originates with the people, but the people appreciating the difficulty of organizing a government on the principle of a pure democracy, deemed it safer and better for the protection of private and public rights to establish representative governments.

The government of the United States, and the states of which it is composed, have established representative governments. The power in all of them is a delegated power to be exercised by the different departments in conformity to their constitutions. The provisions of Section 4, Article IV., of the constitution guarantying to each state a republican form of government implies or pre-supposes that the states now forming the Union have governments republican in form. Our state is one of these governments and necessarily is republican in form. Under our constitution the whole legislative power of the people is delegated, without restriction, to the legislative assembly, consisting of a senate and house of representatives, whose concurrent action is essential to the enactment of all laws. The legislative power, being a delegated power, cannot be delegated, but must be exercised

solely and completely by the legislative assembly. Any law, by which the legislative assembly should delegate its authority to make a law, would be invalid, as contravening the power confided to it under the constitution, and as an infringing of its republican form of government which the constitution of the United States guarantees to every state. A government republican in form is one whose representatives are chosen by the people. It is a government whose powers are delegated and exercised by the representatives of the people. It is opposed to pure democracy, where the people perform all the functions of government directly. Representative democracy, is thus defined by Bouvier: 'A form of government where the powers of the sovereignty are delegated to a body of men elected from time to time, to exercise them for the benefit of the whole nation.' This kind of government constitutes a republic, or a government republican in form. See Minor v. Happersett, 21 Wallace 162.

The people cannot exercise legislative powers while the constitution remains, for they have placed the wisdom and responsibility of legislation, or the making of laws exclusively upon the legislative assembly, subject to executive action. If the legislature were to delegate this power to the people to be exercised by them *en masse*, or through the ballot box, it would be an abandonment of their functions, and in effect, it would destroy the republican form of the government and create a democracy, as contradistinguished from a constitutional democracy; or, if the people were to arbitrarily resume any part of this power, of their own motion, it would be revolutionary. The only way the people can regain, or resume any part of the legislative power would be through a constitutional convention or amendment, and the new constitution must frame a government republican in form, and the amendment must not impair or destroy the republican form of the existing government. In both these ways, the people of different states may regain original powers, and create such governments as may be deemed best to serve their interests and promote their happiness, subject to the constitution of the United States. Any constitutional provision incorporated in a new constitution or any amendment to an existing constitution that should impair the obligation of contracts, or create a government not republican in form, in whole or in part, would have no binding force, and would be void under the constitution of the United States.

In several of the states, there have been laws passed, both local and general, such as liquor, school laws, etc., which have given the people of the locality or state the right to approve or reject them by vote, and the preponderance of judicial decisions has held such laws unconstitutional as a delegation of legislative authority. Briefly, the reasoning of these cases is to the effect that a power conferred upon an agent on account of his fitness and confidence reposed in him cannot be delegated by him to another, and that the legislature stands in the same relation to the people whom they represent. This is a cardinal principle of representative government, and hence, that the legislature cannot delegate the power to make laws to another body or authority.

One of the first questions bearing upon this subject is Rice v. Foster, 4 Harrington (Del.) 488, in which Booth, C. J. says: 'The sovereign power therefore of that state resides with the legislative, executive and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. But although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the constitution remains the paramount law of the land, establish a democracy, or any other than a republican form of government.' I cite a number of these cases *pro* and *con* in order to more fully illustrate the line of their reasoning. Parker v. Commonwealth, 6 Pa. St. 507; Commonwealth v. Judges, 8 Pa. St. 391; Commonwealth v. Painter, 10 Pa. St. 214; Railroad v. State, 1 Ohio St. 77; Maize v. State, 4 Ind. 343; Meshmeier v. State, 11 Ind. 482; Barto v. Himrod, 8 N. Y. 483; People v. Collins, 3 Mich. 343; State v. Copeland, 3 R. I. 33; State v. Society, 24 N. J. L. 365; Santo v. State, 2 Iowa, 165 (Cole's Ed.); State v. Weir, 30 Iowa, 134; Statev. Armstrong, 3 Sneed, 634; Minnesota v. Simonds, 32 Minn. 540; State v. Wilcox, 45 Mo. 458; Lock's Appeal, 72 Pa. St. 491; *Ex parte* Wall, 48 Cal. 279; Bancroft v. Dumas, 21 Vt. 456. See also note to *Re* Municipal Sufferage, 23 L. R. A. 113. The conclusion to be deduced from them is: That by the cardinal principle of representative government, and by the constitution, legislation cannot be exercised by the people; that legislative power cannot be delegated, but can only be exercised by the legislative assembly; and that a law enacted in any other mode or by any other authority than that prescribed in the constitution is void.

From the principles already discussed, and the decisions of the courts, we conclude that a republican form of government is a representative government, by delegation, comprising three departments, and opposed to a democracy, where the people enact all laws, and perform all the functions of government without the intervention of agents; and hence, that the people of the state cannot, under any circumstances, so long as the constitution of the United States remains the permanent law of the land, establish a democracy, or any other than a republican form of government. Tested by these principles, does the initiative and referendum amendment confer legislative power upon the people to be exercised by them in their primary capacity, independent of the legislative assembly? For if it does, essentially and substantially, change or alter the republican form of our state government into a democracy, the amendment is void and must be so declared by this court.

Section 1 of the amendment provides that 'the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve the power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. * * * Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon and not otherwise.'

The initiative power invests the people with the authority to enact laws, or make amendments to the constitution, upon their own responsibility and independent of the legislative assembly, without restriction or limitation. It gives the people power to enact laws in their primary capacity without the intervention of the legislative assembly, and *pro tanto* operates as a revocation of the power delegated to the legislative assembly to enact laws by their own concurrent action. The rights conferred under this amendment are exercised in the enactment of laws substantially in the mode practiced in democracies. It strips the legislative assembly of its delegated functions, leaving it the merest shadow of its representative name, and disturbs the balance of power between the departments of government, crippling their efficiency and effectiveness. Under it, the people may virtually enact all laws; for if the legislature should pass any, they could defeat them, if they so chose, under the power conferred by the referendum. Considering the extent to which the power with reference to the enactment of laws may be exercised, what is left to the legislative assembly? Little more than a name—so greatly diminished is its legislative power. It functions may be so mangled and paralyzed as to leave it only the bare semblance of legislative power, unworthy to be considered one of the great departments of government, such as exist under all governments republican in form. It is needless to illustrate the extent to which this power may be used; the bare reading of the section shows that the legislature may be so stripped of its legislative capacity, and its powers so exercised by the people, as, in this regard, to impair or destroy our republican form of government and convert it into a democracy.

The people 'also reserve the power at their own option to approve or reject at the polls any act of the legislative assembly.' This provision relates to the referendum power. 'The veto power shall not extend to measures referred to the people. * * * Any measure referred to the people shall take effect and become a law, when it is approved by a majority of votes cast thereon, and not otherwise.' This referendum power extends to all laws, except those which are necessary for the immediate preservation of the public health, peace and safety. The laws falling within this exception are not numerous. All other laws are subject to the referendum power, and in exercise of that power as to such laws enacted by the legislature, the people may approve or reject, as their vote may indicate. The courts may declare a law unconstitutional, or the legislature may repeal a law, and in this way a law may be annulled, or displaced, but under the referendum a law, however unobjectionable, passed by the legislature, may be annulled by the people. The power under the referendum can, as effectually and completely destroy a law, as a legislative repeal, or annul it, as a court may judicially, where it is unconstitutional. Representative government contemplates, when a law has been passed by the legislative assembly in due form, and received the approval of the governor, that it becomes the law of the state; it cannot be effaced from the statute books, or its force and effect be destroyed, except by repeal, or decision of the courts. The exercise of such power is inconsistent with the constitutional prerogatives of the legislature, as belonging to their delegated powers, and is subversive of a republican form of government. Considering the amendment as a whole, the power given to originate and enact laws, except laws relating to the public health, etc., and to annul laws enacted by the legislature; to propose and adopt amendments to the constitution, whereby permanent changes, subversive of a republican form of government, may be effected in the fundamental law, and the conclusion is inevitable that the power conferred, whether exercised in the way of legislation or its annullment, strips the legislature of the greater part of its functions as a representative body, and authorizes changes in the constitution which may still further or wholly deprive the legislature of its legislative capacity, and which may so impair the functions of other departments of government as would deprive them, wholly or in part, of their representative character. The power conferred is so extensive and comprehensive that it may be exerted to undermine the constitution and destroy every vestige of representative government and substitute therefor a government where all the powers are exercised directly by the people. Let this amendment stand, and the gate is open for other amendments to follow, impairing or destroying the representative functions of the executive and judiciary. The power given to the legislature alone is sufficient to condemn it, but the further power conferred as to amendments may be wielded to the utter destruction of the constitution, and our republican form of government.

For these reasons, our conclusion is, that this amendment violates that provision of the constitution of the United States which guarantees to every state in the union a republican form of government, and that the courts, under their oaths to support the constitution of the state, and the United States, when such amendment is brought before them for adjudication, are bound to declare and adjudge it null and void."

BOOK REVIEWS.

VAN DYNE ON CITIZENSHIP.

A splendid little volume on the subject of citizenship in the United States is that recently prepared by Frederick Van Dyne, assistant solicitor of the Department of State of the United States. "Citizenship," says Mr. Van Dyne, "always a matter of importance, involving, as it does, the political relationship between the individual and the sovereign state to which he belongs, has become of increasing importance in the United States with the development of this nation as a world power. The wonderful expansion of our commerce which has marked the past decade, and the recent additions to our territory, have made inevitable a broader contact with the nations of the world, and have complicated the relations of our citizens with the governments and citizens of other countries." The work is divided into four great divisions: First, Citizenship by Birth, treating of citizenship by birth in the United States, and citizenship by birth abroad to an American father. Second, Citizenship by Naturalization. Under this heading we have discussed naturalization in pursuance of the general laws of the United States; naturalization by naturalization of parent; naturalization by marriage; naturalization by treaty; naturalization by conquest; naturalization by special act of congress; naturalization by admission to statehood. Third, Passports, treating and explaining the statutes, rules and regulations governing the issuance of passports. Fourth, Expatriation, discussing the interesting subjects of renunciation or abandonment of citizenship, and of the attitude of foreign govern-

ments toward their citizens who have become naturalized in the United States. In an appendix are collated all the laws of the United States relating to citizenship and naturalization, and the text of all treaties or conventions of naturalization to which the United States is a party.

Printed in one volume of 385 pages and published by the Lawyers' Co-operative Publishing Company, Rochester, New York.

LABATT'S MASTER AND SERVANT.

Probably no subject of law is more often litigated than that relating to the relation of master and servant. Authorities, therefore, are not only multiplying on this particular question but tend constantly to confuse the whole subject by adding new exceptions to the general rules. A lawyer cannot be content with anything but the latest authorities on such a subject. For that reason, if for no other, the profession will be interested in a most pretentious and extensive treatise on this important subject just issuing from the press, entitled "Commentaries on the Law of Master and Servant," by C. B. Labatt, of the San Francisco bar. This work is in three volumes, the first and second treating of employer's liability, and the third, relation, hiring and discharge, compensation, strikes, etc.

One of the best features of this work—at least from the practitioner's standpoint—is the freedom of this author from that iniquitous practice which some text-writers have of stating a proposition and then citing a multitude of authorities without any word of explanation or discrimination. When Mr. Labatt cites an authority he follows it in brackets with a short statement of the exact facts passed upon in that particular case. This makes the notes of great length but of equally great value. In a work of this nature a lawyer can well take delight and will very cheerfully pardon any seeming prolixity, for he is saved the enormous waste of time in wading through a multitude of cases in order to pick out those which resemble in their facts that in which he is interested.

Not only this advantage but another equally as valuable, is found in the statement by the author that he has aimed to cite "every decision which has been rendered by a court of review in any of the countries in which the common law is the prevailing system of jurisprudence" and that "the materials collected represent the result of an exhaustive examination of all the reports, whether official, semi-official, or non-official, which have been published in the following countries: England, Scotland, Ireland, the United States, Canada, Australia and New Zealand." No comment is necessary on this statement of the author's purpose, if the latter's aim in that regard has been successfully carried out.

We have examined carefully the first two volumes of this treatise and to say that we were charmed and delighted beyond expression with its excellent and accessible arrangement and its clear, exhaustive and yet succinct statements of the law is not over-stepping the bounds of reason or moderation in the least. We can say without hesitation and without the least exaggeration that this work constitutes the most accurate and complete treatise on the law of master and servant from the practitioner's standpoint, of anything we have ever seen which attempted to treat the law on that subject.

Printed in three volumes and published by the Lawyers' Co-operative Publishing Company, Rochester, New York.

BOOKS RECEIVED.

The Law of Mines and Mining Injuries. By Edward J. White, LL. B. St. Louis: The F. H. Thomas Law Book Co., 1903. Sheep, pp. 994. Price $7.85. Review will follow.

HUMOR OF THE LAW.

Magistrate—"Rastus, I see you are here again. I believe you have been tried and convicted seven times for stealing."

Rastus—"Yes jedge, it seems to be nuffin' but trials and temptations wid me in dis life."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Claims Against Estate.—Joint makers of a note, having sued the payee to be relieved for his failure to present it as a claim against a deceased maker's estate, could not, pending an appeal from an adverse decree, maintain another bill for such relief on a different ground.—Tinker v. Babcock, Ill., 68 N. E. Rep. 445.

2. ACCORD AND SATISFACTION—Acceptance of Check.—The acceptance of a check by a creditor, accompanied by a letter from the debtor, held not an accord and satisfaction.—Mack v. Miller, 84 N. Y. Supp. 440.

3. ACCOUNT, ACTION ON—Services of Attorney.—An account for services of an attorney in a suit extending over more than seven years, charged in one item, is not a book account regularly and fairly kept under the statute.—Taylor v. Addicks, Dela., 55 Atl. Rep. 1010.

4. ACTIONS—Joinder of Causes.—Proceedings to set aside a former decree relating to the same matter, and a suit to foreclose the mortgage involved, may be prosecuted in one action.—Cushing v. Schoeneman, Neb., 96 N. W. Rep. 346.

5. ADULTERY—Admissions.—Under Code, § 1041, where a man was convicted of adultery on his own admissions, which were inadmissible against the female defendant, her acquittal did not preclude his conviction.—State v. Simpson, N. Car., 45 S. E. Rep. 567.

6. APPEAL AND ERROR—Assignment of Error.—It is not proper, on appeal, to raise the same question by different assignments of error.—Seifred v. Pennsylvania R. Co., Pa., 55 Atl. Rep. 1061.

7. APPEAL AND ERROR—Attachment.—In an action of debt, with ancillary proceedings of attachment, the

order of the court, after verdict for plaintiff, condemning the property to pay the judgment, held not prejudicial.—Farmers' Mfg. Co. v. Steinmetz, N. Car., 45 S. E. Rep. 552.

8. APPEAL AND ERROR—Judgment Without Decision.—The entry of a judgment without a decision to support it will be corrected by remitting the case to the trial court for decision and entry of judgment in conformity therewith.—Sommer v. Sommer, 84 N. Y. Supp. 444.

9. APPEAL AND ERROR—Parties.—An appeal will be dismissed for want of parties; only the names of newspapers, not corporations, one published by an individual and the other by a partnership, being given in the notice of appeal.—Sheldon Mail v. O'Brien County Democrat, Iowa, 96 N. W. Rep. 773.

10. APPEAL AND ERROR—Record.—It being impossible to determine from the partial and incomplete record that the trial court erred, its judgment will be affirmed. —Perkins v. Mahan, Ky., 76 S. W. Rep. 339.

11. APPEAL AND ERROR—Reporter's Notes.—Where the reporter's notes are filed with the clerk on the day on which the trial closed, the evidence is properly preserved, whether formally marked "Filed" or not.—*In re* Bruning's Estate, Iowa, 96 N. W. Rep. 780.

12. ASSAULT AND BATTERY—Trespasser.—Occupant of premises held not guilty of assault in using force necessary to remove a trespasser, though he acted in anger.—State v. Crook, N. Car., 45 S. E. Rep. 564.

13. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Authority of Trustee.—Where a trustee of a trust deed for the benefit of creditors unites with the administrator of the grantor in a petition for sale of lands, an allegation that the grantor was seized in fee of the lands held not to affect the rights of creditors.—Robinson v. McDowell, N. Car., 45 S. E. Rep. 545.

14. ASSOCIATIONS—Liability of Member.—Individual contract liabilities of members of an unincorporated voluntary association held merged in a judgment against one of the members individually.—United Press v. A. S. Abell Co., 84 N. Y. Supp. 425.

15. ATTACHMENT—Lien Acquired.—Where all the parties are nonresidents, and plaintiff has no knowledge of any claim to any property in the state by the defendant, the mere filing of a deed in the state is not a constructive discovery on the part of plaintiff of fraud in that deed.—Coulson v. Galtsman, Neb., 96 N. W. Rep. 349.

16. ATTACHMENT—Unliquidated Damages.—To sustain an attachment, where unliquidated damages are claimed, the affidavits must contain sufficient proof to authorize the court to say *prima facie* that damage to the amount claimed has been sustained.—Chazy Marble Lime Co. v. Deely, 84 N. Y. Supp. 896.

17. ATTORNEY AND CLIENT—Consideration.—A contract for attorney's services in the collection of a claim held not void for want of consideration by reason of the fact that the claim would ultimately have been paid voluntarily —Rogers v. Polytechnic Institute of Brooklyn, 84 N. Y. Supp. 12.

18. BANKRUPTCY—Assignment of Insurance.—Where a debtor assigns a policy of insurance to a creditor, and on his subsequent bankruptcy the creditor physically surrendered the policy without proper transfer, it was not necessarily an admission that his title was void.—Traders' Ins. Co. v. Mann, Ga., 45 S. E. Rep. 426.

19. BANKRUPTCY—Attachment.—A creditor, who attaches his debtor's property more than four months before the filing of a petition in bankruptcy against the debtor, held to acquire a lien not destroyed by Bankr. Act, July 1, 1898, ch. 541, § 3a.—Hurlbutt v. Brown, N. H., 55 Atl. Rep. 1046.

20. BANKRUPTCY—Fraudulent Conveyance.—A conveyance of real estate by a wife to her husband, shortly after he had been adjudged a bankrupt, held fraudulent as to the wife's creditors.—Breschemier v. Houston, Iowa, 96 N. W. Rep. 756.

21. BANKS AND BANKING—Preferred Claims.—An order establishing a preferred claim against the assets of an insolvent bank held not to entitle the creditor to a preference in payment of a stockholders' liability fund subsequently accumulated.—Sioux City Stockyards Co. v Fribourg, Iowa, 96 N. W. Rep. 747.

22. BENEFIT SOCIETIES—Consolidation.—A contract by one benefit society to pay a death loss of another association already accrued, in consideration of the transfer to it of the membership of such other association, held void.—Bankers' Union of the World v. Crawford, Kan., 73 Pac. Rep. 79.

23. BENEFIT SOCIETIES—Suicide.—Incontestable clause in constitution of fraternal insurance society estops society from contesting certificate on the ground of suicide, though it is declared to avoid the certificate.—Royal Circle v. Achterrath, Ill., 68 N. E. Rep. 492.

24. BENEFIT SOCIETIES—Waiver of Rules.—The failure of a mutual benefit order to observe its rules regulating the granting of benefits excuses a claimant from exhausting his remedy within such rules.—Schou v. Sotoyome Tribe, No. 12, I. O. R. M., Cal., 73 Pac. Rep. 996.

25. BILLS AND NOTES—Consideration.—The indorsement of a note by the payee to an insurance company, in consideration of a policy on the life of the maker, is supported by a sufficient consideration.—Muller v. Swanton, Cal., 73 Pac. Rep. 994.

26. BILLS AND NOTES—Indorsement.—One who indorses a note in blank and intrusts it to another to fill out and to have it discounted for the indorser's benefit is liable to *bona fide* holder for value who receives it in the usual course of business.—Mechanics' Bank v. Chardavoyne, N. J., 55 Atl. Rep. 1080.

27. BOUNDARIES—Limitations.—Occupancy for the statutory period of limitations up to a division line, marked by a fence, without question of its correctness, held acquiescence therein.—Kennedy v. Niles, Iowa, 96 N. W. Rep. 772.

28. BOUNDARIES—Survey.—Though a survey is made of land in contemplation of deeds dividing it, the line marked on the survey does not control the calls in deeds subsequently made, in case of a variance.—Elliott v. Jefferson, N. Car., 45 S. E. Rep. 558.

29. BREACH OF MARRIAGE PROMISE—Evidence of Seduction.—In an action for breach of marriage promise, evidence that defendant seduced plaintiff is admissible on measure of damage, though seduction is not alleged. —Poehlmann v. Kertz, Ill., 68 N. E. Rep. 467.

30. BROKERS—Procuring Purchaser.—An agreement between an owner of real estate and an agent held not to constitute the latter an agent with authority to procure a purchaser of certain property.—Hunn v. Ashton Iowa, 96 N. W. Rep. 745.

31. BUILDING AND LOAN ASSOCIATIONS—Interest and Premium.—A borrowing member of an insolvent building association is not entitled to have deducted from his indebtedness payments made by him as dues on stocks, as usury.—Peal v. Citizens' Building & Loan Ass'n's Assignee, Ky., 76 S. W. Rep. 332.

32. BURGLARY—Indictment—In an indictment charging the crime of breaking and entering with intent to steal, where the name of the owner of the articles intended to be stolen is alleged, a failure to prove it as laid is a fatal variance.—Crosky v. State, Fla., 35 So. Rep. 153

33. CANCELLATION OF INSTRUMENTS—Burden of Proof. —Where, after making a will dividing his property among his children, the testator deeded certain real estate to his son, the burden was on such son to show that the deed was intended to be in addition to the share devised by the will.—Krause v. Krause, N. J., 55 Atl. Rep. 1095.

34. CARRIERS—Cinder from Locomotive.—A carrier held not liable for injury to a passenger from a cinder from the locomotive coming into a car through an open

door.—Missouri, K. & T. Ry. Co. v. Orton, Kan., 73 Pac Rep. 63.

35. CARRIERS—Delay in Shipment. — The delay of a carrier is in the shipment of freight, though occurring after arrival; the consignee not being notified of the arrival, as required by a universal and well-understood custom.—Alabama & V. R. Co. v. J. M. & C. B. Pounder, Miss., 35 So. Rep. 155.

36. CARRIERS — Duty to Sick Passenger. — A carrier must exercise ordinary care in looking after a passenger who becomes sick or unconscious. — Atchison, T. & S. F. Ry. Co. v. Parry, Kan., 73 Pac. Rep. 105.

37. CARRIERS—Lien.—A public cartman held not entitled to a lien on property in respect to which he had performed no act of carriage.—Taylor v. Smith, 84 N. Y. Supp. 13.

38. CARRIERS—Wrongful Collection of Fare.—In an action by a railway passenger to recover for being required to pay his fare a second time, the court erred in instructing to find for plaintiff only to the amount of the fare so collected.—Strull v. Louisville & N. R. Co., Ky., 76 S. W. Rep. 181.

39. CHATTEL MORTGAGES—Sale of Property.—Consent by a mortgagee to a sale of a portion of the property by the mortgagor held not to render the mortgagee liable for breach of the mortgagor's contract.—Burroughs v. Butler-Ryan Co., Iowa, 96 N. W. Rep. 750.

40. COMPROMISE AND SETTLEMENT — Inadequacy of Consideration. — Payment of $5,370 for an inheritance valued at $25,000 held not so grossly inadequate as to create a conclusive presumption of fraud.—Davis v. Thornley, Ill., 68 N. E. Rep. 482.

41. CONSTITUTIONAL LAW—Ex Post Facto.—Rev. Laws, ch. 218, § 38, including embezzlement in the definition of larceny, held not objectionable as an *ex post facto* law with regard to crimes committed before its passage.—Commonwealth v. Kelley, Mass., 68 N. E. Rep. 346.

42. CONTRACTS—Assumption of Debts.—Where a person takes over the entire stock of another, and publishes a notice that he has assumed the debts for goods purchased by the previous owner, the creditors of such owner are entitled to sue such person in their own names.—Sargent v. Johns, Pa., 55 Atl. Rep. 1051.

43. CONTRACTS—Maintenance.—An assignment of an undivided one-third interest in a pending suit and a contemporaneous agreement held not void as against public policy.—O'Driscoll v. Doyle, Colo., 73 Pac. Rep. 27.

44. CONTRACTS—Precedent Conditions.—A party to a contract cannot insist on the performance by the other party of a condition precedent, when by his own act he has prevented the performance of the condition.—Antonelle v. Kennedy & Shaw Lumber Co., Cal., 73 Pac. Rep. 966.

45. CONTRACTS—Resumption of Marriage Relation.—Contract for resumption of marriage relation, and vesting of dower interest on its breach by husband, held not against public policy.—Sommer v. Sommer, 84 N. Y. Supp. 444.

46. CORPORATIONS—Authority of Agent.—The managing agent of an insurance company, which is the indorsee of a note, held not authorized to bind the company by a promise to release the maker.—Muller v. Swanton, Cal., 73 Pac. Rep. 994.

47. CORPORATIONS—By-Laws.—By-laws not expressly adopted by the directors will be considered as those of the corporation; the conduct of the directors indicating that they regarded them as such.—Graebner v. Post, Wis., 96 N. W. Rep. 783.

48. CORPORATIONS—Contracts of Incorporators.—A corporation which does not assume the contracts of its incorporators held liable thereon because it takes title to and uses property produced under such contracts.—Tryber v. Girard Creamery & Cold Storage Co., Kan., 73 Pac. Rep. 83.

49. CORPORATIONS—Injuries to Patrons.—A corporation furnishing electricity for lighting purposes cannot relieve itself from liability for negligence by stipulations to that effect in its contracts with patrons.—Denver Consol. Electric Co. v. Lawrence, Colo., 73 Pac. Rep. 39.

50. CORPORATIONS—Insolvency.—A director of an insolvent corporation, having in good faith obtained a judgment against it on a *bona fide* indebtedness, may pursue the remedies afforded by law for the collection thereof.—Off v. Jack, Ill., 68 N. E. Rep. 427.

51. CORPORATIONS—Signature of Treasurer.—A writing purporting to be signed by the treasurer of a corporation is not binding on it, in the absence of proof that the person so claiming to act for it was authorized to bind the company.—Coney Island Automobile Race Co. v. Boyton, 84 N. Y. Supp. 347.

52. COVENANTS—Breach of Warranty.—A purchaser of property cannot recover as for breach of warranty as to the amount due on a mortgage thereon; foreclosure not having been attempted, and he not having been disturbed in his possession.—Inderlied v. Honeywell, 84 N. Y. Supp. 333.

53. COVENANTS—"Lawful Claims."—Where a deed contains a covenant to defend against all "lawful claims," it does not include an assessment for a street improvement, the lien of which has not attached.—Cemansky v. Fitch, Iowa, 96 N. W. Rep. 754.

54. CRIMINAL EVIDENCE—Cross-Examination.—Where a witness testified that defendant seemed excited, a question whether his manner was different from that of other men suddenly losing their job was inadmissible.—Sylvester v. State, Fla., 35 So. Rep. 142.

55. CRIMINAL LAW—Former Acquittal. — An acquittal under an indictment for stealing hogs the property of N, is not a bar to an indictment for stealing hogs the property of B.—Carter v. Commonwealth, Ky., 76 S. W. Rep. 337.

56. CRIMINAL TRIAL—Habeas Corpus. — The question whether one sentenced to a place of confinement on being adjudged guilty of crime is confined by a lawful writ is not reviewable on a writ of error, and can only be considered on *habeas corpus*.—Marx v. People, Ill., 68 N. E Rep. 436.

57. CRIMINAL TRIAL—Unlawful Interference.—Tampering with the jury is an unlawful interference with the proceedings in an action, which Code § 654, subsec. 3, makes punishable as a contempt.—*In re* Odum, N. Car., 45 S. E. Rep. 569.

58. DAMAGES—Default of Agent.—Failure to notify a guarantor of the default of an agent whose contract he guarantied has no other effect than to afford him a defense to the extent of the loss or damage sustained by him as a result of such failure.—Swisher v. Deering, Ill., 68 N. E. Rep. 517.

59. DAMAGES—Liquidated.—A contract for the sale of real estate, forfeiting installments of the price for the purchaser's failure to perform, held a contract for liquidated damages, and not a penalty.—Keefe v. Fairfield, Mass., 68 N. E. Rep. 342.

60. DAMAGES — Mortality Tables. — Where mortality tables are introduced in evidence, attention of jury should be called to any other evidence as to probable duration of plaintiff's life.—Seifred v. Pennsylvania R. Co., Pa., 55 Atl. Rep. 1061.

61. DEATH—Damages.—In action for negligent death of a minor daughter, held error for the court to limit the consideration of the pecuniary loss "for the remainder of her minority."—Quill v. Southern Pac. Co., Cal., 73 Pac. Rep 991.

62. DEATH—Damages.—In an action against a railway company for the death of plaintiff's decedent, certain issues held properly refused, in lieu of issue as to what damages plaintiff is entitled to.—Watson v. Seaboard Air Line Ry., N. Car., 45 S. E. Rep 555.

63. DEATH—Presumption.—It is the duty of a husband, absent from his wife, to keep her advised of his whereabouts, and when he fails to do so for 10 years she has the right to believe that he is dead.—*In re* Harrington's Estate, Cal., 73 Pac. Rep. 1000.

64. DESCENT AND DISTRIBUTION—Attorney's Fees.—A court sitting in probate has no jurisdiction to determine the individual liability of heirs for services rendered the estate by attorneys.—*In re* Bruning's Estate, Iowa, 96 N. W. Rep. 780.

65. ELECTIONS—Ineligibility.—Where a defeated party for a nomination knew of the ineligibility of the successful nominee, and failed to present the facts to the county executive committee at its first meeting, it cannot be required to reconvene and pass thereon.—State v. Abbay Miss., 35 So. Rep. 158.

66. EMINENT DOMAIN—Condemnation Proceedings.—An injunction will not lie to restrain a railroad company from prosecuting proceedings for the condemnation of land for a right of way.—Holly Shelter R. Co. v. Newton, N. Car., 45 S. E. Rep. 549.

67. EMINENT DOMAIN—Homestead Claim.—Where an occupying claimant has entered on public lands which are open to settlement for homestead purposes, and has legal vested rights therein, they can be taken from him for public use only by due process of law and the payment of reasonable compensation.—Oklahoma City v. McMaster, Okla., 73 Pac. Rep. 1012.

68. EQUITY—Master's Fees.—It is proper to allow a master in chancery the statutory fees for taking testimony, though the parties employ a stenographer, who is paid 50 cents a page for reporting it.—Barker v. Fitzgerald, Ill., 68 N. E. Rep. 430.

69. EQUITY—Mistake of Law.—A bill in equity will not lie to cancel an agreement to reduce the ground rent as made in mistake of law; plaintiff having a complete remedy at law.—Norris v. Crowe, Pa., 55 Atl. Rep. 1125.

70. ESTOPPEL—Assumption of Debts.—Creditor, by giving receipt in full on payment of less than amount due, held estopped to claim the balance against one assuming for a consideration to pay all the debts of the original debtor.—Ebert v. Johns, Pa., 55 Atl. Rep. 1064.

71. ESTOPPEL—Surety on Note.—The surety on a note, representing that he signed it and that it is valid, thereby inducing the payee to accept it, held estopped from showing that he did not sign it, notwithstanding Ky. St. §§ 470, 482.—Union Cent. Life Ins. Co. v. Johnson's Admx., Ky., 76 S. W. Rep. 335.

72. EVIDENCE—Justification of Libel.—In libel, testimony as to what the husband of plaintiff had told the writer of the article as to her conduct held not admissible under a plea of justification.—Hlasatel v. Hoffman, Ill., 68 N. E. Rep. 406.

73. EXECUTION—Equity in Land.—Where a debtor conveys land to secure a debt without taking back any defeasance, he has an equity in the land, though he cannot enforce it, which equity any creditor may sell for whatever any purchaser may choose to give for it.—Eberly v. Shirk, Pa., 55 Atl. Rep. 1071.

74. EXECUTION—Innocent Purchaser.—A judgment creditor, having at the time of the execution sale notice of a third person's title to the land, held not an innocent purchaser.—Perry v. Trimble, Ky., 76 S. W. Rep. 343.

75. EXECUTORS AND ADMINISTRATORS—Allowance for Attorney.—The temporary administrator held not entitled to an allowance for his attorney representing him on appeal by the heirs to the district court from an order fixing his compensation.—Bell v. Goss, Tex., 76 S. W Rep. 315.

76. EXECUTORS AND ADMINISTRATORS—Costs of Fruitless Suit.—Executor will not be allowed expense of fruitless suits.—*In re* Stanton, 84 N. Y. Supp. 46.

77. EXECUTORS AND ADMINISTRATORS—De Son Tort.—A widow, suing as administratrix of her husband's estate, held not estopped by her consent to defendant's acts to charge deceased's father as an executor *de son* tort.—Rohn v. Rohn, Ill., 68 N. E. Rep. 369.

78. EXECUTORS AND ADMINISTRATORS—Nature of Estate.—Where executors are empowered to sell real estate to pay the debts of the testator, any surplus remaining after payment of the debts is to be distributed as real estate.—*In re* Raleigh's Estate, Pa., 55 Atl. Rep. 1119.

79. EXECUTORS AND ADMINISTRATORS—Setting Aside Sale.—On setting aside sale by administrator to himself, an account should be stated charging administrator with rents and profits, and crediting him with money paid to discharge debts and for taxes and improvements.—Miller v. Rich, Ill., 68 N. E. Rep. 488.

80. EXPERT TESTIMONY—Examination of Witness.—An expert cannot be called upon to give an opinion upon facts in his mind and undisclosed, or on matters in part within his observation and in part derived from others.—Western Union Tel. Co. v. Morris, Kan., 73 Pac. Rep. 108.

81. FALSE PRETENSES—Venue.—Delivery of goods to a common carrier in one county, to be delivered to the consignee in another, is a sufficient delivery to the consignee to consummate the crime of obtaining goods under false pretenses.—*In re* Stephenson, Kan., 73 Pac. Rep. 62.

82. FEDERAL COURTS—Removal of Causes.—A suit to enjoin the violation of an executory order or decree of a federal court cannot be maintained in any other court, state or federal; but application must be made for its enforcement to the court which entered it.—Woods v. Root, U. S. C. C. of App., Seventh Circuit, 128 Fed. Rep. 402.

83. FIRE INSURANCE—Gasoline.—Where a policy on a tenement contained a condition against the keeping of gasoline on the premises, the fact that such substance was kept by a tenant without the knowledge of the landlord did not relieve him from breach of the condition.—Norwaysz v. Thuringia Ins. Co., Ill., 68 N. E. Rep. 551.

84. FIRE INSURANCE—Ownership of Property.—Insured being merely a member of the firm owning the property, the policy, conditioned to be void if the interest of insured be other than unconditional ownership, is ineffectual.—McGrath v. Home Ins. Co., 84 N. Y. Supp. 374.

85. FIXTURES—Removal.—That a lease authorizing the construction of an addition by the tenant contained no provision that it should remain on the premises held not to authorize a presumption of the tenant's right to remove the same.—Holmes v. Standard Pub. Co., N. J., 55 Atl. Rep. 1107.

86. FRAUD—Pleading.—Judgment for plaintiff cannot be sustained, though the evidence shows fraud of defendant; the facts alleged by the complaint not constituting fraud.—Inderlied v. Honeywell, 84 N. Y. Supp. 333.

87. FRAUDS, STATUTE OF—Consideration.—Taking entire stock of goods of another under agreement to assume the debts held a sufficient consideration to pass it to the purchaser, so as to enable the creditors to sue thereon.—Sargent v. Johns, Pa., 55 Atl. Rep. 1051.

88. FRAUDS, STATUTE OF—Parol Contract for Lien.—A parol contract creating a lien on lumber held valid as between the parties and purchasers with notice.—Helfrech Lumber & Mfg. Co. v. Honaker, Ky., 76 S. W. Rep. 342.

89. FRAUDS, STATUTE OF—Pleading.—Where the contract alleged was not within the statute of frauds, but the contract proved on trial violated the statute, the objection might be raised without pleading it.—Fanger v. Caspary, 84 N. Y. Supp. 410.

90. FRAUDULENT CONVEYANCES—Homestead.—A debtor, entitled to land as a homestead, has the right as against his creditor to give it or its proceeds to his wife.—Roark v. Bach, Ky., 76 S. W. Rep. 340.

91. GUARDIAN AND WARD—Bond.—The failure to require a bond on the appointment of a guardian held not to invalidate the guardianship proceedings.—*In re* Chin Mee Ho, Cal., 73 Pac. Rep. 1002.

92. GUARDIAN AND WARD—Unauthorized Expenditures.—Equity can allow a guardian for money necessarily expended in the care and education of the wards, though such expenditures exceeded the income, and

consent of the clerk of court, as required by Code, §§ 1566-1568, was not had.—Duffy v. Williams, N. Car., 45 S. E. Rep. 548.

93. HOMESTEAD — Disposition of Exempt Property.—Land received by an illegitimate son from the widow and heirs of the deceased putative father held not acquired by purchase within the meaning of the homestead law.—Roark v. Bach, Ky., 76 S. W. Rep. 340.

94. HOMESTEAD — Second Marriage. — When a second marriage of a woman having a former husband absent and believed to be dead was not annulled by the courts, the wife held not entitled to a homestead out of the estate of the former husband.—*In re* Harrington's Estate, Cal., 73 Pac. Rep. 1000.

95. HOMICIDE — Character of Deceased.—The dangerous character of the deceased cannot be shown by testimony that a certain witness was not willing to work under him.—Sylvester v. State, Fla., 35 So. Rep. 142.

96. HOMICIDE — Involuntary Manslaughter. — Defendant's shooting of deceased being, if his statements be true, unintentional and accidental, without careless or reckless handling of the pistol, an instruction on involuntary manslaughter should be given. — Messer v. Commonwealth, Ky , 76 S. W. Rep. 331.

97. HUSBAND AND WIFE—Contracts.—Though a wife's name may appear first on notes executed by herself and husband, if the contract is an assumption of the husband's debt, she is not liable, unless she binds herself as required by Ky. St. 1899, § 2127. — Planters' Bank & Trust Co. v. Major, Ky., 76 S. W. Rep. 331.

98. HUSBAND AND WIFE—Sale of Land.—Where a husband participated with his wife in fraudulent representations as to the amount of land conveyed by her to plaintiff, he was liable therefor, though he acted as her agent.—Lewis v. Hoeldtke, Tex., 76 S. W. Rep. 309.

99. INFANTS — Jurisdiction of Court.—A court of chancery has power to authorize the settlement of a suit, brought by a minor to set aside a will, upon terms which, in the opinion of the court, are advantageous to the minor.—Williams v. Williams, Ill., 68 N. E. Rep. 449.

100. INFANTS — Medical Attendance. — Constitutional guaranty of freedom of worship held not violated by statutory requirement that necessary medical attendance be furnished a minor.— People v. Pierson, N. Y., 68 N. E. Rep. 243.

101. INJUNCTION — Boycott.—Equity does not grant injunction in strike or boycott cases, unless complainant has shown substantial pecuniary loss in respect to his property and business, for which an action at law was an inadequate remedy, or where he has shown that he had been deprived of his right to make a living.—Atkins v. W. & A. Fletcher Co., N. J., 55 Atl. Rep. 1074.

102. INSANE PERSONS—Burden of Proof.—In action by the guardian of an incompetent to set aside his conveyance because of unsoundness of mind, the burden is on him to show such mental condition.—Paulus v. Reed, Iowa, 96 N. W. Rep 757.

103. INSANE PERSONS — Guardian. — The probate court is without authority to appoint a guardian for the person and estate of an adult, unless adjudged to be an idiot, or a person of unsound mind, or an habitual drunkard under Gen St. 1901, § 3945. — Martin v. Stewart, Kan., 73 Pac. Rep. 107.

104. INTOXICATING LIQUORS—Dealer's Bond.—In a suit on a liquor dealer's bond for violating the condition that he would not permit a minor to "enter and remain" in his liquor store, there could be no recovery for entry "or" remaining, but the two must concur.—Minter v. State, Tex., 76 S. W. Rep. 312.

105. JUDICIAL SALES — Advertising. — Where a judgment directing a sale of real estate directs the proper advertisement, and the report of the commissioner shows that it was so advertised, in the absence of allegation of proof to the contrary, it must be presumed that the commissioner did his duty in the matter of the sale.—Wigginton v. Nehan, Ky., 76 S. W. Rep. 196.

106. JURY — Summoning Jurors.—A judgment will not be reversed because about 20 of 50 jurors in attendance were from a single precinct, in which the prosecuting attorneys are shown by affidavit to have much personal influence.—Sylvester v. State, Fla., 35 So. Rep. 142.

107. JURY — Waiver of Right. — A property owner, not specifically objecting that damages to his land by reason of a drainage ditch were assessed by commissioners, held to waive his right to jury trial.—Juvinall v. Jamesburg Drainage Dist., Ill., 68 N. E. Rep. 440.

108. LANDLORD AND TENANT — Quiet Enjoyment.—Where a portion of a store is leased to a retail dealer, with the use of a show-window space, unreasonable obstruction of such show window by the lessor is an eviction.—Herpolsheimer v. Funke, Neb , 96 N. W. Rep. 688.

109. LIENS — Furniture Mover.—Furniture mover held not to have lien on sewing machine not moved, and possession of which was taken without owner's consent. —Booker v. Reilly, 83 N. Y. Supp. 1008.

110. LIENS—Notice to Agent.—A purchaser of property, who settled with his seller after notice of a third person's lien thereon for the purchase price on a sale by the third person to the seller, and also for advances made to the seller, settled at his peril. — Helfrech Lumber & Mfg. Co. v. Honaker, Ky., 76 S. W. Rep. 342.

111. LIFE INSURANCE — Sum Payable. — A beneficiary under an insurance policy held entitled to recover the face thereof, in the absence of proof that an assessment levied under insurer's by laws would not have realized an equal amount. — Wood v. Farmers' Life Ass'n, Iowa, 96 N. W. Rep. 226.

112. LIMITATION OF ACTIONS—Fraud of Agent.—Where an agent misappropriates money sent to him, limitations do not run until the principal has knowledge of the wrong. Guernsey v. Davis, Kan., 73 Pac. Rep. 101.

113. LIMITATION OF ACTIONS—Trust Deed.—Where a trust deed confers discretion as to the time of sale of the property, the power to sell and apply the proceeds to the debts is not affected, though the debts secured are barred by limitation.—Robinson v. McDowell, N. Car., 45 S. E. Rep. 545.

114. MANDAMUS—Commitment for Contempt. — Where a judge of the superior court refused to commit a defendant for contempt on his refusing to give his deposition in an action pending before the court, the judge may be compelled to exercise such power of commitment by mandamus.—Crocker v. Conrey, Cal., 73 Pac. Rep. 1096.

115. MANDAMUS—Necessity of Demand.— No demand on a county board to make a tax levy to pay a judgment against an irrigation district, which it is required to make by the law of California, is necessary before filing a petition for a mandamus to compel such levy.—Board of Sup'rs of Riverside County v. Thompson, U. S. C. C. of App., Ninth Circuit, 122 Fed. Rep. 860.

116. MASTER AND SERVANT—Assumed Risk. — The fall of staging, furnished as a completed structure for a certain work and allowed to remain in place for the other work, is not a passing risk of employment, which was assumed. — Bourbonnais v. West Boylston Mfg. Co., Mass., 68 N. E. Rep. 232.

117. MASTER AND SERVANT—Breach of Duty.—A master's employment of a servant after knowledge of delinquencies, whereby he elected not to discharge, might be taken into account in case of a subsequent breach of duty.—Daniels v. Boston & M. R Co , Mass., 68 N. E. Rep. 337.

118. MASTER AND SERVANT—Contract of Employment.—Certificates obtained by an employee that he called on customers held not admissible, even to show he got them, in an action for his discharge, made on the ground that he had not given his exclusive time to his duties as salesman.—Tishman v. Kline, 84 N. Y. Supp. 452.

119. MASTER AND SERVANT—Contributory Negligence.—A conductor, in charge of a freight train in a railroad

yard, who, while giving instructions for the movement of his train, stepped onto a side track without looking, held guilty of contributory negligence as a matter of law.—Lassiter v. Raleigh & G. R. Co., N. Car., 45 S. E. Rep. 570.

120. MASTER AND SERVANT — Dangerous Machinery.—An employee, unfamiliar with machinery, is not chargeable with knowledge of the interior of a cylinder, because he had once helped clean another cylinder, though the outside of the two cylinders were similar.—Joyce v. American Writing Paper Co., Mass., 68 N. E. Rep 218.

121. MASTER AND SERVANT—Negligence.—Accident to an employee in putting a cover on a tank, it tipping and throwing him in, held caused by his negligence. — Sheehan v. Standard Gaslight Co., 84 N. Y. Supp. 34.

122. MASTER AND SERVANT—Unloading Rails.—A servant unloading rails held engaged in work connected with the use and operation of the company's railroad, within Code, § 2071. — Williams v. Iowa Cent. Ry. Co., Iowa, 96 N. W. Rep. 774.

123. MECHANICS' LIENS—Persons Entitled to Contest.—A fraudulent grantee of real estate held entitled to contest the validity of a mechanics' lien, where the conveyance was good as between the parties thereto.—Toop v. Smith, 84 N. Y. Supp. 326.

124. MORTGAGES—Title.—Joint possession of certain land by a vendor and vendee held insufficient to impart notice to a mortgagee of the vendor of the vendee's alleged interest in the property. — Roderick v. McMeekin, Ill., 68 N. E. Rep. 473.

125. MORTGAGES—Transfer of Note.—A transfer of a note carries with it the mortgage securing it, and the want of a formal written assignment will not defeat foreclosure.—Brynjolfson v. Osthus, N. Dak., 96 N. W. Rep. 261.

126. MUNICIPAL CORPORATIONS—Assessment for Improvements.—Lots owned by a street railway company, not used for corporate purposes, held liable to an assessment for an improvement to extent they were increased in value by such improvement.—Chicago Union Traction Co. v. City of Chicago, Ill., 68 N. E. Rep. 519.

127. MUNICIPAL CORPORATIONS — Expense of Constructing Sidewalk. — Determination of a city council that sidewalk should be constructed at the expense of abutting property owners held conclusive of the question of necessity and benefits.—Pierson v. People, Ill., 68 N. E. Rep 383.

128. MUNICIPAL CORPORATIONS—Negligence. — A city held chargeable with knowledge of defects in a temporary crossing built over a ditch in the street. — City of Jackson v. Carver, Miss., 35 So. Rep. 157.

129. MUNICIPAL CORPORATIONS — Stock Law. — The roadbed and right of way of a railroad held liable to an assessment for a local improvement, under a statute establishing a stock law district. — Chatham County Com'rs v. Seaboard Air Line Ry., N. Car., 45 S. E. Rep. 566.

130. NAMES—Initials Idem Sonans.—A judgment against "W. B. Gottleib" was enforceable against the defendant, though his name was "William B. Gottlieb," not being invalid on account of the use of the initials of the Christian name, and surnames used being *idem sonans*.—Gottlieb v. Alton Grain Co., 84 N. Y. Supp. 413.

131. NUISANCE — Damages. — The fact that a tenant leases premises after the creation of a nuisance does not preclude him from recovering the damages caused thereby.—Hoffman v. Edison Electric Illuminating Co., 84 N. Y. Supp. 437.

132. PARTNERSHIP—Remedies of Purchaser.—Where a person is induced to purchase the interest of two partners in a firm by the false representations of the other partner, the new firm cannot maintain an action for deceit against the old firm.—Taylor v. Thompson, N. Y., 68 N. E. Rep. 240.

133. PAUPERS—Settlement. — A pauper's settlement, once acquired, is presumed to continue until another is acquired.—Town of Williamsburg v. Town of Adams Mass., 68 N. E. Rep. 230.

134. PLEADING — Mutual Mistake. — In an action for fraud as to the quantity of land sold, the allowance of a trial amendment alleging a mutual mistake after the evidence was closed held not an abuse of discretion.—Lewis v. Hoeldtke, Tex., 76 S. W. Rep. 309.

135. PRINCIPAL AND AGENT — Authority of Agent. — Where an offer to sell land was accepted by the attorney the prospective purchaser, it was not necessary to the validity of the contract, as against the seller, that the attorney should have been authorized in writing.—Fowler v. Fowler, Ill., 68 N. E. Rep. 414.

136. PRINCIPAL AND AGENT — Liability on Bond. — A bonding company held liable on a collector's bond for a conversion of rents in which the collector had an interest.—City Trust, Safe-Deposit & Security Co. v. Lee, Ill., 68 N. E. Rep. 485.

137. PRINCIPAL AND AGENT — Title of Mortgagor. — A mortgagee cannot be charged with notice of facts tending to show that the mortgagor did not have title to the property mortgaged, within the knowledge of the mortgagee's agent which the latter acquired while acting as agent for another.—Roderick v. McMeekin, Ill., 68 N. E. Rep. 473.

138. PRINCIPAL AND SURETY—Failure of Payee to Sue.—Where the maker of a note was insolvent when sureties notified the payee to sue thereon, the payee's failure to sue held no defense to the sureties.—Robertson v. Angle. Tex., 76 S W. Rep. 317.

139. RAILROADS—Flagman at Crossing.—It is not negligence *per se* for a railroad not to maintain a flagman at a crossing.—Seifred v. Pennsylvania R. Co., Pa., 55 Atl. Rep. 1061.

140. RAILROADS—Injury to Licensee.—A licensee on the tracks of a railroad may recover for a personal injury caused by an act of commission or active negligence on the part of the railroad's servants.—Meneo v. Central R. Co. of New Jersey, 84 N. Y. Supp. 448.

141. RAILROADS — Speed Through Country.—There is no limit to the speed at which trains may be run in country districts.—Custer v. Baltimore & Ohio R. Co. Pa., 55 Atl. Rep. 1130.

142. RAILROADS — Telegraph Lines. — Conveyance of railroad to telegraph company held subject only to construction that it attempted to confer on purchaser right o maintain a telegraph line for commercial purposes.—Hodges v. Western Union Tel. Co., N. Car., 45 S. E. Rep. 572.

143. RECEIVING STOLEN GOODS — Indictment.—Where an indictment charges in one count larceny and in another the receiving of stolen goods, and the instructions relate only to the first count, a verdict finding accused guilty under the second count entitles him to a new trial.—State v. Adams, N. Car., 45 S. E. Rep. 553.

144. REFORMATION OF INSTRUMENTS—Mortgage.—Notes secured by a mortgage absolute in form will not be reformed for mistake, unless the proof is clear and satisfactory.—Sauer v. Nehls, Iowa, 96 N. W. Rep. 759.

145. RELEASE — Consideration. — The promise of the managing agent of an insurance company, the indorsee of a note, that the maker would not be troubled, held not supported by a consideration.—Muller v. Swanton, Cal., 73 Pac. Rep. 994.

146 RELEASE—Joint Tort Feasor. — Joint debtor held not relieved of contract to pay his proportion of a judgment in tort because creditor had made a similar agreement with another judgment debtor.—Kolb v. National Surety Co., N. Y., 68 N. E. Rep. 247.

147. SALES—Damages for Delay.—Acceptance by a purchaser of materials tendered by the seller after the time when the same was to be furnished held not a waiver of the purchaser's right to damages for delay. — Medart Patent Pulley Co. v. Dubuque Turbine & Roller Mill Co., Iowa, 96 N. W. Rep. 770.

148. SALES—Proof of Delivery.—Admission, in an action for the price of shoes, that a certain amount was due, except as it might be reduced by proof of offsets or settlement, makes proof of delivery of the shoes unnecessary.—Danziger v. Pittsfield Shoe Co., Ill., 68 N. E. Rep. 534.

149. SALES—Warranty.—Where a buyer of farm machinery was to return the same if it did not comply with the warranty, he was not entitled to retain the machine and sue for breach of warranty. — McCormick Harvesting Mach. Co. v. Arnold, Ky., 76 S. W. Rep. 323.

150. SPECIFIC PERFORMANCE— Consideration.—Where a father agreed to convey land to his daughter at an agreed price, to be credited on an indebtedness due from him to her, the consideration was sufficient to justify specific performance.—Fowler v. Fowler, Ill., 68 N. E. Rep. 414.

151. SPECIFIC PERFORMANCE—Lease of Brickyard.—A suit for specific performance of an agreement to purchase a long lease of a brickyard, buildings, and machinery held maintainable; the recovery of money being inadequate.—Covert v. Brinkerhoff, 84 N. Y. Supp. 4.

152. SPECIFIC PERFORMANCE — Transaction with Deceased.—A father's agreement to loan a certain sum to his son, who should pay interest thereon during the father's life, and that the loan should be canceled on the father's death, held enforceable in equity. — Sauer v. Nehls, Iowa, 96 N. W. Rep. 759.

153. STATUTES — School Districts. — A classification of school districts, proceeding on lines germane to the objects and purposes of the law, may make an amendment providing for the management and support of schools general.—Riccio v. City of Hoboken, N. J., 55 Atl. Rep. 1109.

154. STREET RAILROADS—Crossing Tracks.—A traveler, injured while attempting to cross street car tracks, held precluded from recovering therefor.—Schroder v. Metropolitan St. Ry. Co., 84 N. Y. Supp. 371.

155. STREET RAILROADS—Removal of Tracks.—A mortgagee of a leasehold interest in a street railway held not a necessary party to a suit by the city for the removal of the tracks, the right to maintain them having expired.—Suburban R. Co. v. City of Chicago, Ill., 68 N. E. Rep. 422.

156. SUICIDE—What Constitutes.—One who actually accomplishes the commission of suicide is not guilty of an attempt to commit suicide, and hence does not commit a crime within meaning of insurance certificate declared void if insured should die in commission of crime. —Royal Circle v. Achterrath, Ill , 68 N. E. Rep. 492.

157. TAXATION—Interstate Commerce. — Cars of a foreign corporation, having its principal office in another state, in transit in Illinois, bringing merchandise from another state into or through this state, are instruments of interstate commerce, and not subject to taxation here.—*In re* Union Tank Line Co., Ill., 68 N. E. Rep. 504.

158. THREATS—Indictment.—In a prosecution for obtaining money by threats to kill, indictment held not objectionable for failure to allege to whom the threats were made.—Glover v. People, Ill., 68 N. E. Rep. 464.

159. TRADE UNIONS—Right to Strike. — A bill in equity, filed by complainants against an association of employers, held to make the complainants stand before the court as employers, and not as employees.—Atkins v. W. & A. Fletcher Co., N. J , 55 Atl. Rep. 1074.

160. TRUSTS—Conveyance by Incompetent. — In a suit between the guardian of an incompetent and an heir of his deceased wife, claiming an interest in lands deeded by the husband to the wife, held, that defendant had no equities in the property.—Paulus v. Reed, Iowa, 96 N. W. Rep. 757.

161. TRUSTS — Declaration of Trust. — A subsequent writing directing a trustee to make deeds for lots to whomsoever a person named should direct held not to affect the declaration of trust previously executed.—McCleary v. Chipman, Ind., 68 N. E. Rep. 320.

162. TRUSTS—Enforcement. — A guardian of certain minors, who had never qualified, held not a necessary party to a bill to enforce a trust in favor of such minors. —Pfefferle v. Herr, N. J., 55 Atl. Rep. 1103.

163. TRUSTS—Interest of Remainder. — Trustees under a will held authorized to devote the income of the property given to them for the support of testator's children for life, and required to pay over what was not required for such purposes to the remaindermen.—Demeritt v. Young, N. H., 55 Atl. Rep. 1047.

164. TRUSTS—Purchase of Land. — In the absence of fraud or mistake, the fact that title to land purchased was taken in the name of plaintiff's wife by reason of plaintiff's undue subjection to her demands held insufficient to establish a constructive trust thereof.—Cline v. Cline, Ill., 68 N. E. Rep. 545.

165. USURY—Demand Notes. — Where a demand note required payment of interest semi-annually, the semi-annual interest installments drew interest from the date they were due until paid.—Mastin v. Cochran's Ex'r, Ky., 76 S. W. Rep. 343.

166. VENDOR AND PURCHASER — Breach of Contract.—A vendor, having failed to make payment of installments or offered to pay the balance due, held not entitled to maintain a suit to recover installments paid.—Keefe v. Fairfield, Mass., 68 N. E. Rep. 342.

167. VENDOR AND PURCHASER — Sale of Land.—Where a purchaser of land was induced to purchase by mutual mistake or false representations as to the amount of the land, he was not barred from recovering damages because he believed there was more than the amount represented.—Lewis v. Hoeldtke, Tex., 76 S. W. Rep. 309.

168. VENDOR AND PURCHASER — Tender of Deed.—Where the tender of a deed is restricted by conditions which were to be performed before the grantee was to be entitled to it, such a conditional tender is valid.—McCleary v. Chipman, Ind., 68 N. E. Rep. 320.

169. WATERS AND WATER COURSES — Irrigation. — A lower riparian owner cannot enjoin an irrigation enterprise by an upper appropriator under the statute because his damages have not been paid. — McCook Irrigation & Water Power Co. v. Crews, Neb., 96 N. W. Rep. 996.

170. WATERS AND WATER COURSES — Pollution of Stream. — An oral consent by the owner of land to the laying of tile for carrying sewage across the land held not to estop him from suing to enjoin pollution of a stream by the inadequacy of the tile. — City of Kewanee v. Otley, Ill., 68 N. E. Rep. 348.

171. WATERS AND WATER COURSES—Ultra Vires Act.—Agreement in contract between village and waterworks company for purchase of waterworks for five years held *ultra vires* and void. — *In re* Board of Water Com'rs of Village of White Plains, N. Y., 68 N. E. Rep. 348.

172. WILLS — Statutory Rights.—A minor son, living with his widowed mother, has no such right in the widow's award or homestead right as will prevent her from electing to take under her husband's will in lieu of those claims. — Friederich v. Wombacher, Ill., 68 N. E. Rep. 459.

173. WILLS — Testamentary Capacity.—Where a will is attacked for want of testamentary capacity, the burden of establishing it is not sustained by showing a delusion of the testator, without proof that the delusion controlled or affected the execution.—Wait v. Westfall, Ind., 68 N. E. Rep. 271.

174. WILLS—Undue Influence.—Where a will is written or procured to be written by a person largely benefited by it, the proof must be such as to fully satisfy the court that the testator was not imposed on.—England v. Fawbush, Ill., 68 N. E. Rep. 526.

175. WITNESSES—Competency.—Where, in a suit to set aside deeds executed by a father to his daughter, the complainants have testified to conversations with her, she is competent to testify as to such conversations over a general objection to her competency.—Colston v. Olroyd, Ill., 68 N. E. Rep. 373.